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# Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Theft

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## CONTENTS

PAGE

### ARTICLES

#### THINGS FALL APART: THE ILLEGITIMACY OF

##### PROPERTY RIGHTS IN THE CONTEXT OF PAST

##### PROPERTY THEFT

*Bernadette Atuahene* 829

Past property theft is often a volatile political issue that has threatened to destabilize many nascent democracies. How does a transitional state avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft? To explore this question, I first define legitimacy and past property theft by relying on empirical understandings of the concepts. Second, I establish the relationship between property-related disobedience and a highly unequal property distribution that the general population views as illegitimate. Third, I describe the three ways a state can achieve stability when faced with an illegitimate property distribution: by using its coercive powers, by attempting to change people's beliefs about the legitimacy of the property distribution, or by enacting a Legitimacy Enhancing Compensation Program (LECP), which strengthens citizens' belief that they ought to comply with the law. Fourth, I develop a legitimacy deficit model, which is a rational-choice model that suggests when a state should enact an LECP to avoid property-related disobedience. To best promote long-term stability, I argue that states should, at the very least, enact an LECP as the cost of illegitimacy begins to outweigh the cost of compensation. Lastly, since many of the model's relevant costs are subjective, I suggest a process that states should use to determine and weigh the costs. In sum, the Article is intended to spark a debate about how compensation for past property theft can keep things from falling apart.

#### THE RACIAL DISPROPORTIONALITY MOVEMENT

##### IN CHILD WELFARE: FALSE FACTS AND

##### DANGEROUS DIRECTIONS

*Elizabeth Bartholet* 871

A powerful coalition has made "Racial Disproportionality" the central issue in child welfare today. It notes that black children represent a larger percentage of the foster care population than they do of the general population. It claims this is caused by racial discrimination and calls for reducing the number of black children removed to foster care. But the central question is whether black children are disproportionately victimized by maltreatment. If so, black children should be removed at rates proportionate to their maltreatment rates, which will necessarily be disproportionate to their population percentage. Racial equity for black children means providing them with protection against maltreatment equivalent to what white children get. The evidence indicates that black children are in fact disproportionately victimized by maltreatment. This is to be expected because

black families are disproportionately characterized by risk factors associated with maltreatment, including severe poverty, serious substance abuse, and single parenting. These are reasons for concern and reform. But the problems—and consequently the solutions—are entirely different from those identified by the Movement. Society should act to prevent the disproportionate maltreatment of black children, and provide greater support to families at risk of falling into the dysfunction that results in maltreatment. This should result in a reduction in the number of black children in foster care, without putting them at undue risk.

#### FACTBOUND AND SPLITLESS: THE CERTIORARI

##### PROCESS AS BARRIER TO JUSTICE FOR

##### INDIAN TRIBES

*Matthew L.M. Fletcher* 933

The Supreme Court's certiorari process does more than help the Court parse through thousands of "uncertworthy" claims—the Court's process creates an affirmative barrier to justice for parties like Indian tribes and individual Indians. The Court has long maintained that the certiorari process is a neutral and objective means of eliminating patently frivolous petitions from consideration. But this empirical study of 163 preliminary memoranda, recently made available when Justice Blackmun's papers were opened, demonstrates that the Court's certiorari process is neither objective nor neutral. The research, reflecting certiorari petitions filed during October Term 1986 through 1993, demonstrates that statistically, there is a near zero chance the Supreme Court will grant a certiorari petition filed by tribal interests. At the same time, the Court grants certiorari to far more petitions filed by opponents of tribal sovereignty.

#### SLAVERY AS PUNISHMENT: ORIGINAL PUBLIC

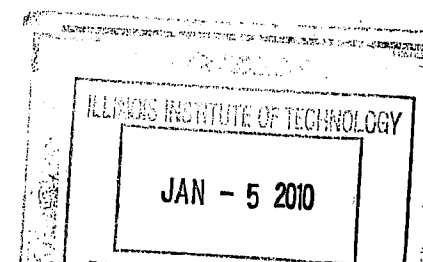
##### MEANING, CRUEL AND UNUSUAL

##### PUNISHMENT, AND THE NEGLECTED CLAUSE

##### IN THE THIRTEENTH AMENDMENT

*Scott W. Howe* 983

In relatively specific constitutional language that courts and scholars have long neglected, the Thirteenth Amendment authorizes slavery as a punishment for crime. This Article shows that the original public meaning of the slavery-as-punishment clause leads to abhorrent outcomes, including the emasculation of many modern protections grounded on the Eighth Amendment. This conclusion challenges those who assert that steadfast originalism will not produce grossly objectionable results. It also challenges the view that steadfast originalism finds justification as an effort to preserve a core of legitimacy-enhancing features in the Constitution. The Article thus reminds us why the original meaning, even when clear, is not conclusive in constructing the modern meaning of the Constitution.



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## THINGS FALL APART: THE ILLEGITIMACY OF PROPERTY RIGHTS IN THE CONTEXT OF PAST PROPERTY THEFT

Bernadette Atuahene\*

*Past property theft is often a volatile political issue that has threatened to destabilize many nascent democracies. How does a transitional state avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft? To explore this question, I first define legitimacy and past property theft by relying on empirical understandings of the concepts. Second, I establish the relationship between property-related disobedience and a highly unequal property distribution that the general population views as illegitimate. Third, I describe the three ways a state can achieve stability when faced with an illegitimate property distribution: by using its coercive powers, by attempting to change people's beliefs about the legitimacy of the property distribution, or by enacting a Legitimacy Enhancing Compensation Program (LECP), which strengthens citizens' belief that they ought to comply with the law. Fourth, I develop a legitimacy deficit model, which is a rational-choice model that suggests when a state should enact an LECP to avoid property-related disobedience. To best promote long-term stability, I argue that states should, at the very least, enact an LECP as the cost of illegitimacy begins to outweigh the cost of compensation. Lastly, since many of the model's relevant costs are subjective, I suggest a process that states should use to determine and weigh the costs. In sum, the Article is*

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\* J.D. 2002, Yale Law School; M.P.A. 2002, Harvard University, John F. Kennedy School of Government; B.A. 1997, University of California, Los Angeles. I benefitted from the comments and criticisms of Karen Alter, Traci Burch, Bruce Carruthers, Ewurama Ewusi-Mensah, Terence Halliday, Michael Plaxton, Richard Warner, and Ekow Yankah. I also received valuable comments from the participants of: the American Bar Foundation Seminar Series; Chicago-Kent College of Law Faculty Speaker Series; Cincinnati/Chicago-Kent Junior Faculty Exchange; Fordham Law School Faculty Speaker Series; Law and Society Annual Conference; Property Works-in-Progress Conference; University of Illinois Conference on the New Human Rights Arena: Transnational Criminal Law; University of Witwatersrand Faculty of Law Seminar Series; and Valparaiso Law School Faculty Speaker Series. Outstanding research and library assistance was provided by Christine McIsaac, Gillian Nicols-Smith, and Stephanie Crawford.

*intended to spark a debate about how compensation for past property theft can keep things from falling apart.*

### INTRODUCTION

A significant amount of property, especially land, has been unjustly acquired or transferred through force at various points throughout history. The Americas, for example, were founded upon land forcibly taken from native peoples.<sup>1</sup> Under Hitler, the Nazis plundered vast amounts of property from Jews, Roma, and Sinti.<sup>2</sup> In Communist countries, newly minted governments expropriated property without paying compensation from innumerable individuals and vested it in the state.<sup>3</sup> Colonial powers usurped untold amounts of land in Africa, Latin America, and Asia and transferred it to European settlers.<sup>4</sup> And, in the midst of the Rwandan genocide, radical Hutu appropriated much of the property owned by the Tutsi and moderate Hutu they massacred.<sup>5</sup> Examples of the uncompensated taking of property by force abound.

1. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

2. See SAUL S. FRIEDMAN, *A HISTORY OF THE HOLOCAUST* (2004); JUDIT MOLNÁR, *THE HOLOCAUST IN HUNGARY: A EUROPEAN PERSPECTIVE* (2005); 2 THE NAZI HOLOCAUST: THE FINAL SOLUTION: THE IMPLEMENTATION OF MASS MURDER (Michael R. Marrus ed., 1989); Doris L. Bergen, *The Nazi Concept of 'Volksdeutsche' and the Exacerbation of Anti-Semitism in Eastern Europe, 1939-45*, 29 J. CONTEMP. HIST. 569, 571 (1994).

3. See, e.g., Richard W. Crowder, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT'L & COMP. L. REV. 237, 238 (1994) (noting that outside of the Soviet Union itself, the greatest magnitude of property confiscation and nationalization occurred in the Czech Republic); Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 626 (1996); Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 VAND. J. TRANSNAT'L L. 809, 813 (1994) (noting that Communist expropriations in East Germany occurred both under the Soviet occupation from 1945 to 1948, and under the East German Government from 1949 to 1989).

4. See generally Naved Hamid, *Dispossession and Differentiation of the Peasantry in the Punjab During Colonial Rule*, 10 J. PEASANT STUD. 52 (1982); Anna Johnston & Alan Lawson, *Settler Colonies, in A COMPANION TO POSTCOLONIAL STUDIES* 360 (Henry Schwarz & Sangeeta Ray eds., 2000); Thembela Kepe, *Land Restitution and Biodiversity Conservation in South Africa: The Case of Mkambati, Eastern Cape Province*, 38 CANADIAN J. AFR. STUD. 688, 688 (2004) ("Land dispossession of Africans was central to colonialism and apartheid. Thus, the struggles against these two forces in South Africa focused on loss of land . . ."); Joseph Schechla, *Ideological Roots of Population Transfer*, 14 THIRD WORLD Q. 239, 241 (1993) ("[R]acist concepts prevailed among the colonisers that consigned the indigenous people to sub-human categories and sought to justify the acquisition of their land by force. . . . In less than a century after the accidental arrival of Columbus on the continent, [Pedro] de Valdivia had realized the dream to extend Spanish possession over all the lands southward to the Tierra del Fuego. In this period, a policy to 'descargar la tierra' (empty the land) was implemented to break the indigenous people's characteristic attachment to their territory.").

5. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 197 (2001) (citing a USAID-commissioned study which attributes conflicts between neighbors to land scarcity, and concludes by saying

This Article explores the question: how does a state avoid present-day property-related disobedience when past property theft causes a significant number of people to believe that the current property distribution is illegitimate? Several scholars have explored how inequality can cause political violence and how land reform can prevent revolution.<sup>6</sup> There are also several scholars that have analyzed how restitution or reparations can remedy past property theft.<sup>7</sup> This Article adds to the existing literature by specifically investigating the relationship between past property theft, a present property distribution widely perceived as illegitimate, and property-inspired rebellion.

In the first Part of the Article, I define legitimacy and past property theft, relying on empirical understandings of the concepts. From there, I proceed in the second Part to demonstrate the relationship between a highly unequal property distribution that the general population views as illegitimate, and property-related disobedience. In the third Part, I describe the three ways a state can achieve stability if an illegitimate property distribution leads to property-related disobedience: by using its coercive powers; by attempting to change people's beliefs about the legitimacy of the property distribution; or by enacting a Legitimacy Enhancing Compensation Program (LECP). In the fourth Part of the Article, I develop the concept of a legitimacy deficit, which is a rational-choice model that establishes when a state should enact an LECP if its primary concern is averting property-related disobedience. The model requires states to weigh the net cost of compensation against the net cost of illegitimacy. To best promote long-

"[d]isputes over land are reported to have been a major motivation for Rwandans to denounce neighbors during the ethnic conflicts of 1994"; GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 248 (1995) (noting while the desire to acquire Tutsi land was not the primary motivation behind the 1994 mass killings, there was "an element of material interest in the killings. . . . Villagers also probably had a vague hope that if things settled down after the massacres they could obtain pieces of land belonging to the victims, a strong lure in such a land-starved country as Rwanda."); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1249-50 (2000) (noting that some Hutu "pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled").

6. See *infra* Section III.

7. See, e.g., Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419 (2007) [hereinafter Atuahene, *From Reparation to Restoration*]; Ruth Hall, *Land Restitution in South Africa: Rights, Development, and the Restrained State*, 38 CANADIAN J. AFR. STUD. 654, 654 (2004) ("During the negotiated transition to democracy, many South Africans expected that liberation would bring the return of land of which they had been dispossessed under colonialism and apartheid, but the terms on which the transition was negotiated constrained the parameters of how this could happen."); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003); see also RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (Scott Leckie ed., 2003); Michael Heller & Christopher Serkin, *Revaluing Restitution: from the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999) (reviewing HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1998)); Michael L. Neff, *Eastern Europe's Policy of Restitution of Property in the 1990s*, 10 DICK. J. INT'L L. 357 (1992).

term stability, I argue that states should enact an LECP as the cost of illegitimacy begins to outweigh the cost of compensation.

Lastly, since many of the model's relevant costs are subjective, I suggest a process states should use to determine and weigh the costs. This model is a valuable contribution to the literature on transitional justice because it gives conceptual clarity to the question of how a transitional state can maintain stability if extensive past property theft threatens its present stability. Further, this model gives citizens, policymakers, and academics a framework within which they can identify and debate the various costs and benefits involved. Finally this model is a valuable analytical tool because it is versatile enough to apply to a wide array of contexts and time periods.

The Article is intended to spark a debate about how compensation for past property theft can keep things from falling apart by preventing land invasions and other property-centered crimes. The terms "property-related disobedience," "property-related instability," and "property-related rebellion" refer to the breakdown of a state's authority relationships that results in systematic property-related noncompliance.<sup>8</sup> This Article only investigates ways that states can avoid property-related disobedience, but acknowledges that other issues beyond the scope of this inquiry are at play. For example, how an existing state can promote justice, equality, or efficient markets when past property theft causes a significant number of people to believe that the current property distribution is illegitimate.

The research question I pose is timely and important for four primary reasons. First, several states (including Zimbabwe, Nicaragua, Rwanda, Israel, Guatemala, and South Africa) have experienced or are experiencing property-related disobedience at least partly because of the unjust and uncompensated taking of property that occurred in the past.<sup>9</sup> Second, many states that go through

radical political transition in the future will have to address property theft that occurred under the previous regime to ensure legitimacy and stability in the new political environment.

Third, as I argue in Part III, in certain situations, *when a state decides to ignore past property theft*, its actions can run contrary to intuitive views of justice, lead to reduced compliance with the law,<sup>10</sup> and potentially undermine the state's stability. Intuitive views of justice suggest that if property owners acquire their property through just means, they deserve some degree of freedom to retain or transfer their property. The notion of desert underlies a state's duty to protect property as well as a citizen's obligation to respect property rights. However, a widely held perception that the present property distribution is the result of extensive past property theft corrupts the notion of desert. The result is that intuitive understandings of justice no longer dictate that law should give strong protection to property that is widely regarded as stolen unless past theft is rectified.

Fourth, and in contrast, a state's decision *to address past property theft* is also potentially problematic because evaluating past misdeeds can inflame extant class, racial, regional, or ethnic tensions, foment unrest, and even render a state weak and ungovernable.<sup>11</sup> In designing its Land Restitution Program (LRP), South Africa decided to remedy land dispossession claims dating only as far back as 1913 although systematic, unjust land dispossession had occurred since the arrival of Europeans in 1652.<sup>12</sup> The government made this decision because "most deep historical claims are justified on the basis of membership in a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics."<sup>13</sup> Property-related instability can loom large whether or not a state decides to address past property theft.

8. Scholars have defined political instability in various ways. See, e.g., Alberto Alesina et al., *Political Instability and Economic Growth*, 1 J. ECON. GROWTH 189, 189 (1996) (noting that political instability is the "propensity [for] government collapse"); Tatiana Fic & Omar F. Saqib, *Political Instability and the August 1998 Ruble Crisis*, in GERMAN INSTITUTE FOR ECONOMIC RESEARCH SERIES (2006), available at <http://www.diw.de/documents/publikationen/73/44717/dp626.pdf> (noting that political instability is frequent changes in and of government); Donald G. Morrison & Hugh Michael Stevenson, *Political Instability in Independent Black Africa: More Dimensions of Conflict Behavior Within Nations*, 15 J. CONFLICT RESOL. 347, 348 (1971) (defining political instability as "a condition in political systems in which the institutionalized patterns of authority break down, and the expected compliance to political authorities is replaced by political violence").

9. TOM TIRIVANGANI, LAW, LAND REFORM AND SOCIAL JUSTICE: A CASE FOR ZIMBABWE (2004); LUKE ZUNGA, FARM INVASIONS IN ZIMBABWE: WHAT LESSONS FOR DEMOCRACY IN AFRICA? (2003); Deena I. Abu-Lughod, *Failed Buyout: Land Rights for Contra Veterans in Postwar Nicaragua*, LATIN AM. PERSP., May 2000, at 32; Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, LATIN AM. POL. & SOC'Y, Fall 2001, at 61; Michael Fischbach, *Settling Historical Land Claims in the Wake of Arab-Israeli Peace*, J. PALESTINE STUD., Autumn 1997, at 38; Ruth Hall, *A Political Economy of Land Reform in South Africa*, 31 REV. AFR. POL. ECON. 213, 214 (2004) (noting the World Bank advised that redistributing the land in South Africa was "necessary to avert social and political instability"); Donald Neff, *U.S. Policy and the Palestinian Refugees*, 18

J. PALESTINE STUD. 96, 96-98 (1988) (discussing the initial property theft, which evolved into violent instability between Israel and Palestinians); Saskia Van Hoyweghen, *The Urgency of Land and Agrarian Reform in Rwanda*, 98 AFR. AFF. 353, 353 (1999) ("If Rwanda is to evolve towards a more stable future, the urgency with which the country's land problem demands action cannot be overemphasised. In addition to being one of the most pressing problems, the issue of land is also perhaps the most complex—being absorbed by (and coming to embody) the various economic, social and political challenges facing present-day Rwanda."); Álvaro Del Carpio León, *Analysis and Possible Improvements of the Land Restitution Process in Guatemala* (Mar. 2005) (unpublished M.S. thesis, International Institute for Geo-Information Science and Earth Observation), available at [http://www.itc.nl/library/Papers\\_2005/msc/gim/del\\_carpio.pdf](http://www.itc.nl/library/Papers_2005/msc/gim/del_carpio.pdf).

10. There is evidence that people are less willing to comply with laws that diverge from their commonsense views of justice. More problematically, if people perceive one law as unjust, then this can adversely affect their willingness to comply with unassociated laws. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005).

11. This point is made repeatedly in the literature on why truth commissions are superior to prosecutions. See, e.g., Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, LAW & CONTEMP. PROB., Autumn 1996, at 81.

12. See S. AFRICAN DEP'T OF LAND AFFAIRS, THE GREEN PAPER ON SOUTH AFRICAN LAND POLICY 37 (1996).

13. *Id.*

For these four reasons, it is important that scholars think critically about how a state can avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft.

### I. LEGITIMACY AND PAST PROPERTY THEFT DEFINED

One can assess legitimacy empirically or morally; the former is based primarily upon average citizens' observed attitudes and beliefs, while the latter is based on a theory of justice. Max Weber, one of the most influential theorists on the topic of legitimacy, adopts an empirical definition in his great work, *Economy and Society*.<sup>14</sup> He claims that legitimacy is (a) a widespread belief that one ought to obey the law and (b) the resulting compliance with the law based on this belief.<sup>15</sup> Weber asserts:

[L]egitimacy is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails.<sup>16</sup>

Weber's definition of legitimacy is based upon willing compliance with law or authority and thus is closely related to stability.<sup>17</sup> Since stability is central to my research question, I have also adopted a Weberian, empirical definition of legitimacy. "Legitimacy" is a generalized belief that an authority, institution, law, or social arrangement *ought to be* obeyed because it is appropriate within some socially constructed system of norms, values, and beliefs.<sup>18</sup> One can evaluate

14. MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968).

15. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 382. There may be, however, instances where an individual believes she ought to obey the law but—due to weakness of will—she does not comply. Weber's definition of legitimacy still holds true, nevertheless, so long as we assume that this weakness of will is not the norm.

16. See A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 748–50 (1999) (quoting and discussing Charles Taylor, *Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada*, in COMMUNITARIANISM: A NEW PUBLIC ETHIC 58 (Markate Daly ed., 1994)). There is a substantial literature in psychology and political science about legitimacy. For a thorough literature review of legitimacy as discussed in psychology, see Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376–77 (2006). For a thorough literature review of legitimacy as discussed in political science, see James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187 (2005).

17. Hyde, *supra* note 15, at 381.

18. The level of willing compliance with law and hence the level of stability is positively correlated with the magnitude of the generalized beliefs. There are various definitions of legitimacy in the literature. See, e.g., Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 381 (1999) (Legitimacy is the "normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor's *perception* of the institution.");

legitimacy at various levels (for example, the legitimacy of a state, society, leader, institution, or social arrangement). Much of this Article explores the legitimacy of a particular socio-legal arrangement—property distribution.<sup>19</sup> Under a legitimate property distribution there is a generalized belief that the laws and institutions upholding the property distribution ought to be obeyed because they are appropriate within some socially constructed system of norms, values, and beliefs.<sup>20</sup>

The legitimacy of the state may alter a population's acceptance of an illegitimate property distribution. In South Africa, for example, the post-apartheid state has significant legitimacy although, due to the severe and enduring inequalities born under Apartheid, the property distribution does not.<sup>21</sup> James Gibson surveyed 3700 South Africans and found that 85% of black respondents believe that "most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today."<sup>22</sup> Two of every three blacks agreed that "land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country."<sup>23</sup> If it were not for the legitimacy of the state, Gibson's data suggests that South Africa probably would have had an outbreak of land invasions long ago.

Like the definition of legitimacy, the definition of past property theft is primarily based on the average citizen's observed beliefs and values, although objective historical facts play an important role. "Property theft" or "unjust dispossession" occurs when a society has a generalized belief that one group would not own their property if it were not for the past systematic and uncompensated confiscation of property from another group. Based on objective historical fact, the United States confiscated parts of Texas, California, Arizona,

Mark Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995) ("Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."); Tyler, *supra* note 16, at 377 ("Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just.").

19. "Property" includes real, personal, and intangible property.

20. A society's belief that the laws ought to be obeyed should be corroborated by actual compliance with the laws.

21. See Robert Mattes, *Building Popular Legitimacy for the "New" Democratic South Africa: A Partial Success Story?*, YALE CENTER FOR INT'L & AREA STUD. (2007) (noting that even though many South Africans live in poverty and are without land, the state has experienced high levels of legitimacy).

22. JAMES GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 31 (2009) [hereinafter GIBSON, *OVERCOMING HISTORICAL INJUSTICES*].

23. *Id.* Nationally 68% of crimes are property related. The most common types of property-related crimes are "burglary at a residential premises," "theft out of or from a motor vehicle" and "malicious damage to property." CRIME INFO. ANALYSIS CTR., S. AFR. POLICE SERV., *CRIME STATISTICS FOR SOUTH AFRICA* (1994/1995 to 2003/2004), available at [http://www.capegateway.gov.za/eng/pubs/public\\_info/C/86878/1](http://www.capegateway.gov.za/eng/pubs/public_info/C/86878/1). In the country's urban centers, electric fences, private security guards, high security walls, and alarm systems are the norm because of the high theft rates.

Nevada, and New Mexico from Mexico in the mid-nineteenth century.<sup>24</sup> There is, however, no generalized belief among the populations of Mexico or the United States that the individuals who own property in these areas today are beneficiaries of past property theft. In contrast, based on objective historical fact, European descendants have confiscated land from Africans in Zimbabwe, Namibia, and South Africa since the nineteenth century.<sup>25</sup> But, there is a strong generalized belief in Zimbabwe, Namibia, and South Africa that much of the land presently owned by whites is stolen.<sup>26</sup>

While the empirical definitions of legitimacy and past property theft I have provided are ideal for framing a discussion about stability, they have several limitations.<sup>27</sup> First, leaders can manipulate a population's beliefs. For example, during World War II and the Rwandan genocide average citizens engaged in morally abhorrent activities because genocidal leaders took advantage of citizens' fears and angst.<sup>28</sup> These leaders duped ethnic Germans and Hutus into believing that their fellow citizens' lives were worth very little—literally, less than vermin.<sup>29</sup>

Second, a small privileged group can affect societal beliefs and attitudes in unfavorable ways. One example is that the elite who control thought-shaping

24. See ODIE B. FAULK, *LAND OF MANY FRONTIERS: A HISTORY OF THE AMERICAN SOUTHWEST* 107–25, 140–47, 264–67 (1968) (explaining how each state transitioned from Mexican rule to American statehood).

25. See J.B. Peires, *The British and the Cape 1814–1834*, in *THE SHAPING OF SOUTH AFRICAN SOCIETY, 1652–1840*, at 472, 503 (Richard Elphick & Hermann Giliomee eds., 1989) (explaining that “request-places” became the dominant form of land tenure used by British settlers, whereby a farmer could occupy a piece of land as soon as he had sent in a “request”); Neil H. Thomas, *Land Reform in Zimbabwe*, 24 *THIRD WORLD Q.* 691, 693 (2003) (noting that beginning in 1879 British “settlers helped themselves to the best land, enserfed the original inhabitants, or else pushed them out into less fertile areas”).

26. See GIBSON, *OVERCOMING HISTORICAL INJUSTICES*, *supra* note 22.

27. Others find problematic the purely attitudinal accounts of legitimacy, which heavily depend upon the context in which generalized beliefs are formed. See Simmons, *supra* note 16, at 750 (“On such accounts states could create or enhance their own legitimacy by indoctrination or mind control; or states might be legitimated solely by virtue of the extraordinary stupidity, immorality, imprudence, or misperceptions of their subjects.”); see also Robert Grafstein, *The Legitimacy of Political Institutions*, 14 *POLITY* 51, 51 (1981) (arguing for a revised conception of legitimacy in which legitimacy is based not on psychological states, but rather the direct properties of an institution).

28. See MAMDANI, *supra* note 5; Drumbi, *supra* note 5, at 1249–50 (noting that some Hutu “pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled.”). See generally sources cited *supra* note 2.

29. For example, Tutsi were routinely referred to as cockroaches. See Cyprian F. Fisiy, *Of Journeys and Border Crossings: Return of Refugees, Identity, and Reconstruction in Rwanda*, 41 *AFR. STUD. REV.* 17, 21 (1998) (“The Tutsi were consistently stereotyped by the regime as inyensi (‘cockroaches’), who should never be allowed to rule again.”). See also BILL BERKELEY, *THE GRAVES ARE NOT YET FULL: RACE, TRIBE, AND POWER IN THE HEART OF AFRICA 2* (2001) (quoting radio propaganda by Simon Bikindi of A Thousand Hills Free Radio-Television: “The Tutsi *inyenzi*—cockroaches—are bloodthirsty murderers. They dissect their victims, extracting vital organs, the heart, liver and stomach.”) (internal quotations omitted).

social institutions such as media outlets may have an undue influence on what people believe. For instance, in the United States, Rupert Murdoch's News Corporation is one of the largest media conglomerates in the world with a market capitalization of about \$68 billion.<sup>30</sup> Some believe that by using some of his media outlets to promulgate his conservative views and support Republican political leaders, Murdoch has leveraged his company's dominance to shape what Americans believe.<sup>31</sup>

Third, my definition of legitimacy and past theft considers only the existence and prevalence of a belief rather than the logic or legitimating ideology behind it.<sup>32</sup> But, the legitimating ideology may be objectionable on moral grounds. For instance, in some societies there may be a generalized belief that all women should be subject to female genital mutilation. If the logic underlying this belief is that women are inferior childlike beings who cannot control their sexual urges, then the belief is objectionable on moral grounds. An empirical definition of legitimacy and past property theft accounts only for what people believe without evaluating the moral worthiness of the logic underlying the belief.

Fourth, empirical definitions of legitimacy and past property theft present potential challenges for minority groups because they rely on generalized beliefs. The property distribution's legitimacy in America versus South Africa is a perfect illustration of the problem. Given the history of brutal land theft in the United States, Native Americans' beliefs regarding whether they ought to obey property laws may differ significantly from the perspectives of the rest of the population. Their compliance with property laws may be explained more by the threat of sanctions than by any internalized notions of what they ought to do.<sup>33</sup> But, since

30. Rik Kirkland, *Think Again: Rupert Murdoch*, 158 *FOREIGN POL'Y*, Jan. 2007, at 24.

31. See Daya Kishan Thussu, *Murdoch's War—A Transnational Perspective*, in *WAR, MEDIA, AND PROPAGANDA: A GLOBAL PERSPECTIVE* 93, 95 (Yahya R. Kamalipour & Nancy Snow eds., 2004) (“In the United States, Murdoch's media has been an enthusiastic supporter of the Republican cause, including the deregulation of broadcasting. Analyzing for nineteen weeks (between January and May 2001) the FOX News Channel's flagship daily program *Special Report with Brit Hume*, the media monitoring group FAIR (Fairness and Accuracy in Reporting) found an overwhelming slant on FOX News toward Republicans and conservatives: of the fifty-six guests with declared political affiliations interviewed on the program during the monitoring period, fifty were Republicans. Of the others, sixty-five of the ninety-two guests (71 percent) were avowed conservatives.”).

32. For discussion purposes, I am making a hard distinction between beliefs and the legitimating ideologies underpinning the beliefs, but in reality the two concepts are much more fluid. Beliefs are reflective of background ideologies. See Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 293, 294 (1994). A person can believe she ought to obey an authority based on various legitimating ideologies. Weber categorizes the different legitimating ideologies as falling under three sources of authority, which include traditional (derived from religious beliefs, customs, values, and morals), charismatic (derived from the actions or character of a person in power), and rational bureaucratic (derived from the authority's compliance with the rule of law). WEBER, *supra* note 14, at 941–55.

33. See *infra* Part III.

Native Americans account for less than 2% of the population, the measure of the United States' property distribution's legitimacy is only nominally affected by this group's beliefs.<sup>34</sup> In contrast, if Africans in South Africa<sup>35</sup> (who constitute about 80% of the population) have markedly different beliefs than non-Africans as to whether they ought to obey property laws, the measure of the legitimacy of South African property distribution is heavily affected.<sup>36</sup> Thus empirical measures of legitimacy and past theft can be problematic because they discount the beliefs of minorities when they differ from those of the majority.

Moral definitions of legitimacy and past property theft that are based on a theory of justice would address these four enumerated shortcomings. But, while a moral definition is important, it is beyond the scope of my research. This Article investigates how a state can avoid present-day property-related rebellion when a significant number of people believe that the current property distribution is illegitimate because of past property theft. Despite the moral shortcomings of an empirical definition, the key to stability is whether a significant section of the population *believes* that past property theft has occurred and whether they *believe* that they ought to comply with property arrangements nevertheless. Consequently, an empirical definition is most relevant and useful for the research question presented in this Article.<sup>37</sup>

## II. THE RELATIONSHIP BETWEEN AN UNEQUAL AND ILLEGITIMATE PROPERTY DISTRIBUTION AND PROPERTY-RELATED INSTABILITY

If a population begins to perceive that its highly unequal property distribution is illegitimate, property-based disobedience may result if the state's last line of defense—its coercive power—fails to secure compliance with law. There is substantial evidence that economic inequality can lead to instability. An empirical study by Bruce Russett uses regression analysis to show that political instability is positively correlated specifically with land-related inequality.<sup>38</sup> Other scholars have found a correlation between instability and inequality that is not necessarily land-related. For example, Manus Midlarsky presented empirical evidence that political violence does not result from general inequality but rather

34. U.S. CENSUS BUREAU, RACIAL STATISTICS BRANCH, THE AMERICAN COMMUNITY—AMERICAN INDIANS AND ALASKA NATIVES: 2004, at 1 (May 2007), available at <http://www.census.gov/prod/2007pubs/acs-07.pdf> ("The 2004 ACS estimated the number of American Indians and Alaska Natives to be about 4 million, or 1.4 percent of the U.S. household population.").

35. In the context of South Africa, Black with a capitalized "B" includes groups known as Africans, Coloureds, and Asians under Apartheid.

36. SouthAfrica.info, South Africa's Population, [http://www.southafrica.info/ess\\_info/sa\\_glance/demographics/population.htm](http://www.southafrica.info/ess_info/sa_glance/demographics/population.htm) (last visited July 22, 2008) ("Africans are in the majority at just over 38-million, making up 79.6% of the total population. The white population is estimated at 4.3-million (9.1%), the coloured population at 4.2-million (8.9%) and the Indian/Asian population at just short of 1.2-million (2.5%).").

37. Morality comes into an inquiry about stability as one of many legitimating ideologies that explains why a significant section of the population may believe they ought to comply with an authority.

38. Bruce M. Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 WORLD POL. 442 (1964).

patterned inequality, which is the level of a population's impoverishment in comparison to the ruling sector.<sup>39</sup> Collective Action and Deprived Actor theorists argue that political violence results when inequality is coupled with some other factor.<sup>40</sup> Collective Action theorists suggest that in order for revolutions or political instability to result, income inequality must be accompanied by high levels of dissident organization and low levels of government repression.<sup>41</sup> Deprived Actor theorists argue that economic inequality will lead to rebellion "only if some intermediate psychological processes (e.g., expectation formation and anger) are present to transform grievances about relative poverty into behavioral dissent."<sup>42</sup> The collective evidence thus supports the claim that inequality significantly contributes to instability.<sup>43</sup>

In this Article, I am specifically interested in whether a severely unequal property distribution can become the motivating factor behind property-related disobedience. The international illegal squatting phenomenon presents an excellent example of how a highly inegalitarian property distribution can cause a large section of the population to consider it illegitimate and hence motivate the population to flout the laws that uphold that distribution. Millions of squatters illegally occupy publicly and privately owned lands all over the developing

39. Manus I. Midlarsky, *Rulers and the Ruled: Patterned Inequality and the Onset of Mass Political Violence*, 82 AM. POL. SCI. REV. 491, 493 (1988). For a critique of Midlarsky, see Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577 (1989).

40. See Mark Irving Lichbach, *Will Rational People Rebel Against Inequality? Samson's Choice*, 34 AM. J. POL. SCI. 1049, 1050 (1990). What makes peasants rebel is a question that received intense scholarly attention throughout the seventies. Many scholars believe that inequality per se is not the answer. Scott posits that it is the erosion of subsistence security, while Prosterman argues that it is the high rate of landlessness. Paige believes that peasants that are easily organized—tenants and wage laborers on commercial estates—are the most revolutionary. See JEFFREY M. PAIGE, *AGRARIAN REVOLUTION: SOCIAL MOVEMENTS AND EXPORT AGRICULTURE IN THE UNDERDEVELOPED WORLD* 3 (1975); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); JAMES C. SCOTT, *THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA* (1976). Lichbach points out that the relationship between economic inequality and rebellion is hardly clear:

Two decades of empirical research—consisting of over three dozen studies of conflict using aggregate data at the city, regional, and national levels—have challenged the conventionally accepted view that a strong positive relationship exists between economic inequality and political conflict. Numerous studies do purport to show that economic inequality has a positive impact on political dissent, but numerous studies also purport to show negative and negligible relationships.

Lichbach, *supra*, at 1050.

41. Mark Lichbach, *An Evaluation of "Does Economic Inequality Breed Political Conflict?"* *Studies*, 41 WORLD POL. 431, 464 (1989).

42. *Id.* at 459.

43. Kang H. Park, *Income Inequality and Economic Progress: An Empirical Test of the Institutional Approach*, 55 AM. J. ECON. & SOC. 87, 87 (1996) ("The empirical results show that the greater the inequality in the distribution of personal incomes, the greater the level of socio-political instability, and that the greater the level of socio-political instability, the slower the economic progress.").



world.<sup>44</sup> Squatters gain possession through land invasions, which occur when an individual or group illegally occupies a vacant parcel of land and immediately erects some form of shelter.<sup>45</sup>

People illegally occupy land for numerous reasons, the most prominent of which is pervasive societal inequality.<sup>46</sup> In many countries, some individuals own so much land that much of it is left vacant while others have none.<sup>47</sup> This inequality in conjunction with the fact that poor people lack access to affordable housing and land means that indigent individuals and families often have no other choice but to secure shelter or land for subsistence farming through land invasions.<sup>48</sup> In the Philippines, land invasions are so prevalent that "as of 1995, forty percent of the urban population did not own or have clear title to the land they occupied."<sup>49</sup> UN-Habitat reports that in many cities more than two-thirds of the population lives in informal settlements, which are created through land invasions.<sup>50</sup> In countries where land invasions are commonplace and squatters

44. See Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT'L L. REV. 1109 (2004) [hereinafter Atuahene, *Legal Title*] (analyzing the issue of land invasions and titling in the Philippines, Peru, and South Africa).

45. The authorities can either do nothing about the invasion and allow the squatters to remain in possession, or they can demolish the structures and reclaim the land for the landowner; the former response is more likely because generally squatters are also voters. This is the case in many developing countries, including Turkey:

Given that squatters are voters, this made it very unlikely that politicians would rein in the overnight builders. Statistics in Istanbul show the growth. In 1958, city authorities counted 40,000 *gecekondus* (informal) houses in Istanbul, with a population of 280,000 people. By 1963, that had tripled to 120,000 houses with a population of about 660,000 people, or close to 35 percent of the city.

Robert Neuwirth, *Security of Tenure in Istanbul: The Triumph of the 'Self Service City,' prepared for U.N. HUMAN SETTLEMENTS PROGRAMME, ENHANCING URBAN SAFETY AND SECURITY* 6-11 (2007) available at <http://www.unhabitat.org/downloads/docs/GRHS.2007.CaseStudy.Tenure.Turkey.pdf>.

46. James L. Gibson, *Overcoming Land Injustices: An Experimental Investigation Into the Justice and Injustice of Land Squatting in South Africa*, WORKING GROUP IN AFRICAN POL. ECON. 7 (2005), available at [http://www.sscnet.ucla.edu/polisci/wgape/papers/8\\_Gibson.pdf](http://www.sscnet.ucla.edu/polisci/wgape/papers/8_Gibson.pdf) ("Squatting is caused by two dominant factors: (1) The massive influx of landless people from the countryside to the cities; and (2) the vast economic inequality in the country.").

47. *Id.*

48. Gerrit Huizer, *Land Invasion as a Non-Violent Strategy of Peasant Rebellion: Some Cases from Latin America*, 9 J. PEACE RES. 121 (1972) (arguing that land invasions are a non violent strategy of land reform).

49. Atuahene, *Legal Title*, *supra* note 44, at 1145 (quoting Michael Lee, *The Community Mortgage Program: An Almost-Successful Alternative for Some Urban Poor*, 19 HABITAT INT'L 529, 532 (1995)).

50. See U.N. Human Settlements Programme [UN-HABITAT], *Monitoring Housing Rights: Developing a Set of Indicators to Monitor the Full and Progressive Realisation of the Human Right to Adequate Housing*, 1 (Working Paper No. 1, 2003); see also United Nations Human Settlements Programme [UN-HABITAT], *The Challenge of Slums: Global Report on Human Settlements*, 82-83, 211-12 (2003) ("In Durban, informal

make up a significant portion of the population, the property distribution is illegitimate because average citizens do not believe that they ought to obey the property laws that uphold the present property status quo.<sup>51</sup>

In sum, the international squatting phenomenon is one effective illustration of the relationship between inequality, an illegitimate property distribution, and noncompliance with law.<sup>52</sup>

### III. HOW A STATE CAN AVOID PROPERTY-RELATED DISOBEDIENCE WHEN FACED WITH AN ILLEGITIMATE PROPERTY DISTRIBUTION

#### A. Bases for Compliance with Law

Legitimacy is not the only impetus for compliance with law; the threat of coercive sanctions, self-interest, and habit form additional bases of obedience.<sup>53</sup>

When compliance is based on coercion, external factors are most prominent in an individual's decision-making calculus. There must be an asymmetry of power such that the stronger party has the ability to force compliance despite the self-interest of the weaker party.<sup>54</sup> If the threat of sanctions wanes, compliance with authority will diminish, but if the threat is pronounced, compliance will increase.<sup>55</sup> The state often uses coercion in a routine exercise of its police power. For instance, tickets for speeding, fines for littering, and incarceration for killing are generally considered acceptable uses of the state's coercive power. But the state can also use its coercive power in furtive ways;<sup>56</sup> and

dwelling act as substitutes for about 75% of the metropolitan gross housing backlog of 305,000 units. . . . It is estimated that 20 to 25 per cent of Jakarta residents live in *kampungs*, with an additional 4 to 5 per cent squatting illegally along riverbanks, empty lots and floodplains.").

51. Laws contrary to people's commonsense views of justice may encourage diminished compliance with not only the laws people perceive as unjust, but also unrelated laws. Nadler provides preliminary experimental evidence that suggests a "willingness to disobey the law can extend far beyond the particular unjust law in question, to willingness to flout unrelated laws commonly encountered in everyday life." Nadler, *supra* note 10, at 1399.

52. Zimbabwe is another example. In Zimbabwe, property theft during the Colonial and Apartheid periods has led to acute inequality of landownership and widely held views that property distribution is illegitimate. Consequently, in 2000 there was massive noncompliance with law in the form of land invasions, which were encouraged by the ruling party. For a more thorough discussion of property theft in Zimbabwe, see generally TIRIVANGANI, *supra* note 9; ZUNGA, *supra* note 9; see also sources cited *infra* note 110.

53. See Tyler, *supra* note 16, at 377 (noting that legitimacy "is an additional form of power that enables authorities to shape the behavior of others distinct from their control over incentives or sanctions").

54. See Hurd, *supra* note 18, at 383-84.

55. *Id.*

56. The intrepid voting rights activist, Fannie Lou Hamer, eloquently describes a furtive use of the state's coercive power during the U.S. Civil Rights Movement:

non-state actors can use coercive power to force compliance with prevailing laws.<sup>57</sup>

When obedience is based on self-interest, people will follow a rule or authority because it promotes their individual well-being. A rule's compatibility with an individual's self-interest is positively correlated with her degree of compliance. But, self-interest on its own is a fickle basis to secure obedience because laws often do not coincide with an individual's self interest. For instance, exacting physical revenge on my enemies, parking wherever I want, and not paying taxes are all in my self-interest but are against the law.<sup>58</sup>

There is a definite overlap between self-interest and coercion. They differ, however, in that self-interest is explained by self-restraint based on various psychological and social incentives and disincentives, while coercion is based on external restraint such as the threat or use of physical violence or sanctions.<sup>59</sup> The line between the two is not always clear because people can internalize the threat of external sanctions.

Sometimes, neither self-interest nor the threat of sanctions factors into the decision-making calculus that determines compliance with law. Sometimes people comply with a law because they always have. Habit is a source of obedience based on reflex rather than reasoning. Habit is an even less effective means for states to secure compliance because they cannot systematically control people's habits such that their compliance with law increases.<sup>60</sup>

A confluence of self-interest, sanctions, habit, and legitimacy—or just one factor in isolation—can explain an individual's compliance with law.<sup>61</sup> The

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On just one day—September 3, 1962—these incidents occurred, all connected to the vote drive: a black city worker in Ruleville was fired, two black dry cleaning establishments were shut down, Williams Chapel Baptist Church was told it was losing its tax exemption and free water, and a plantation bus driver was told that henceforth he would need a hard-to-obtain commercial license to ferry workers to the field. The fired city worker's wife had been going to the voter registration classes. The dry cleaners were owned by blacks. The suddenly uninsured church was a meeting place for voter registration workers. And the mother of the harassed bus driver had registered to vote.

KAY MILLS, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* 40 (1993).

57. For instance, during the Civil Rights Movement, landowners used their economic power over black sharecroppers to ensure that they complied with prevailing Jim Crow laws by firing sharecroppers who dared to vote. An example of this can be found in Fannie Lou Hamer's biography. See *id.*

58. This is related to the prisoner's dilemma, which characteristically entails a conflict between group and individual rationality. See generally WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* (1992); ANATOL RAPOPORT & ALBERT M. CHAMMAH, *PRISONER'S DILEMMA* (1965); FRANK ZAGARE, *GAME THEORY: CONCEPTS AND APPLICATIONS* (1984).

59. Hurd, *supra* note 18, at 386.

60. For a general discussion of habit, see H.L.A. HART, *CONCEPT OF LAW* 6–115 (1961).

61. In general, people's obedience most often has something to do with the threat of sanctions or legitimacy because habit and self-restraint do not consistently and effectively secure compliance.

following hypothetical illustrates the anatomy of obedience: Kwame is a race-car enthusiast who has just bought a brand-new Mustang, reputed to accelerate from 0 to 60 miles per hour (mph) in 4.5 seconds. He is driving along a deserted country road in Kankakee, Illinois, and complying with the 40-mph speed limit. He is one hour late for his son's baptism, there are no other drivers on the road, and he knows for a fact that the police do not monitor this obscure road. Generally, Kwame may comply with the speed limits for several reasons: he does not want to get a speeding ticket (sanctions); he wants to decrease his chances of collision (self-interest); he has put no thought into it and obeys because he always has (habit); or he believes that he ought to (legitimacy).

In this specific situation, it is in Kwame's self-interest to speed because he is anxious to arrive at his son's baptism and the chances of having an accident on this deserted road are minimal. He is an avowed speed demon, so he does not drive within the speed limit due to habit. He knows the police do not monitor the road so it is impossible for him to receive a speeding ticket. In this scenario, the legitimacy of the law, state, or law-making process is the reason Kwame believes he ought to obey the speed limit and the reason he acts on this belief by driving 40 mph.

This hypothetical illustrates that legitimacy can be differentiated from self-interest, habit, or coercion when a person's obedience is based primarily upon internalized notions of what he *ought* to do.<sup>62</sup>

### ***B. Three Options a State Has to Maintain Stability when It Is Encumbered with an Illegitimate Property Distribution***

A state has three viable options for securing compliance with the law when it is encumbered with an illegitimate property distribution.<sup>63</sup> It can (1) use its coercive power to ensure compliance with the illegitimate property distribution, (2) increase the property distribution's legitimacy by shaping people's beliefs, or (3) implement a Legitimacy-Enhancing Compensation Program (LECP).

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62. Tyler and Lind, for example, point out that "Social psychologists have long distinguished between obedience that is the result of coercion and obedience that is the result of internal attitudes and opinions (i.e. voluntary compliance)." Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 118 (Mark Zanna ed., 1992). For further discussion, see generally HERBERT KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* (1990); Barry Collins & Bertram Raven, *Group Structure: Attraction, Coalitions, Communication, and Power*, in 4 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 102 (Gardner Lindzey & Elliot Aronson eds., 1969); Bertram Raven & John R.P. French, Jr., *Group Support, Legitimate Power, and Social Influence*, 26 *J. PERSONALITY* 400 (1958).

63. A property distribution is illegitimate when it causes a significant segment of the population to believe that they ought not comply with the laws that uphold the property distribution. See *supra* Part I.

### 1. Using Coercion

In a seminal work, James Davies argued that when legitimacy is lacking, states will use coercive pressure to secure compliance with the law.<sup>64</sup> Building on Davies' work, S. Brock Blomberg conducted a study and found that increases in defense spending lead to decreases in political instability.<sup>65</sup> But, coercion enhances stability only to a certain point. In fact, due to the alienating effects of coercion, a state's use of coercion can lower a citizen's willingness to voluntarily comply or, at worst, lead to aggressive instances of noncompliance.<sup>66</sup> Also, there is ample evidence in social psychological literature that the "use of power, particularly coercive power, requires a large expenditure of resources to obtain modest and limited amounts of influence over others."<sup>67</sup> Thus, in the end, securing willing compliance is much more effective and less costly than a state's use of coercive power.

### 2. Influencing People's Beliefs

Pervasive inequality can cause a population to believe that the property distribution is illegitimate. When this happens, willing compliance with laws that uphold unequal property distribution may lessen. To maintain stability, states can rationalize endemic inequality by initiating, propagating, or exaggerating the various stereotypes and doctrines that shape what people believe.<sup>68</sup>

64. James C. Davies, *Toward a Theory of Revolution*, 27 AM. SOC. REV. 5, 6-7 (1962) (noting that the state will more frequently need to use the police power to coerce people to comply with the law in absence of legitimacy). Yankah defines coercive pressure as "that which can overcome one's will and make a particular course of action unreasonably costly." Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1218 (2008).

65. S. Brock Blomberg, *Growth, Political Instability and the Defence Burden*, 63 ECONOMICA 649, 649 (1996).

66. Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259 (Joel Slemrod ed., 1992) ("However, the retroactive, confrontational, and coercive aspects of a deterrence approach to law enforcement also have an indirect, negative effect by alienating taxpayers and lowering their willingness to comply voluntarily with the law. Lower willingness to comply may lead to active efforts to evade taxes illegally, as well as to such other forms of tax resistance as aggressive legal avoidance, increased use of appeals processes, and political lobbying to muzzle the tax agency.").

67. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 277 (2006). See also Raven & French, *supra* note 62; Tyler, *supra* note 16, at 376. Also, domestic monies spent on defense have significant opportunity costs because it crowds out spending in other social sectors. See Blomberg, *supra* note 65, at 656. Foucault argues that in lieu of physical force or direct threats states can use techniques of organization, standardization and observation to maintain order as done in jails, schools, military institutions and factories. See generally MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1970).

68. M.R. Jackman & M.S. Senter, *Different, Therefore Unequal: Beliefs about Trait Differences Between Groups of Unequal Status*, 2 RES. SOC. STRATIFICATION & MOBILITY 309, 331-32 (1983) (noting that stereotypes can make inequality seem natural).

Some stereotypes vilify the poor by portraying them as shiftless, morally corrupt individuals who deserve their fate.<sup>69</sup> Based on psychological evidence, Brenda Major argues that:

[B]ecause outcome disparities between themselves and disadvantaged outgroup members tend to be attributed to internal causes or causes under personal control, members of disadvantaged groups often appraise these disparities as legitimate. Consequently, the disadvantaged often come to believe they are personally entitled to less than do members of more advantaged groups.<sup>70</sup>

On the other hand, stereotypes can also be used to depict poverty as virtuous in an effort to rationalize inequality, particularly through complementary stereotypes "in which advantaged and disadvantaged group members are seen as possessing distinctive, offsetting strengths and weaknesses."<sup>71</sup> An experimental study by Aaron Kay and John Jost found that the "poor but happy" and "poor but honest" stereotypes are particularly effective in helping the poor to rationalize and tolerate inequality.<sup>72</sup>

Alternatively, the state can passively benefit from the ability of individuals, media, and other thought-shaping social institutions to accomplish the task.

69. Many empirical studies have investigated society's tendency to derogate the poor to satiate its need to believe that we live in a just world. See Aaron C. Kay & John T. Jost, *Complementary Justice: Effects of "Poor but Happy" and "Poor but Honest" Stereotype Exemplars on System Justification and Implicit Activation of the Justice Motive*, 85 J. PERSONALITY & SOC. PSYCHOL. 823, 824 (2003). See also Carolyn L. Hafer & James M. Olson, *Beliefs in a Just World and Reactions to Personal Deprivation*, 57 J. PERSONALITY 799, 799 (1989); Leo Montada & Angela Schneider, *Justice and Emotional Reactions to the Disadvantaged*, 3 SOC. JUST. RES. 313 (1989); Barbara Reichle & Manfred Schmitt, *Helping and Rationalizing as Alternative Strategies for Restoring the Belief in a Just World: Evidence from Longitudinal Change Analyses*, in THE JUSTICE MOTIVE IN EVERYDAY LIFE 127 (Michael Ross & Dale T. Miller eds., 2002).

70. See Major, *supra* note 32, at 313. When the disadvantaged are aware that their outcomes differ from those of others and believe that those discrepancies are illegitimate, then they will feel like their entitlements have been violated. Perceptions of illegitimacy are enhanced when there are:

(1) personal or situational factors that cause a person to take a collective rather than a personal perspective on deprivation and disadvantage; (2) factors that enhance the perception that the procedures underlying the current distribution of outcomes are unfair (e.g., biased, inconsistent, prejudice), and (3) personal ideologies and collective representations that locate the cause of disadvantage in external agents (e.g., the system) rather than in individual attributes.

*Id.* at 338.

71. John T. Jost et al., *System-Justifying Functions of Complementary Regional and Ethnic Stereotypes: Cross-National Evidence*, 18 SOC. JUST. RES. 305, 308 (2005).

72. Kay & Jost, *supra* note 69, at 834. Kay and Jost also discuss the conclusions of previous scholarship:

Lane (1959) theorized that holding complementary, offsetting stereotypic beliefs helped people (especially the poor) to tolerate and justify economic inequality. He specifically suggested that 'poor but happy' and 'poor but honest' stereotypes were particularly useful in

Certain doctrines can function much in the same way as stereotypes. For example, the Christian religious doctrine concerning the children of Ham helped justify the economic, social, and political subordination of black slaves in the Antebellum South.<sup>73</sup> The ninth chapter of Genesis in the Christian Bible tells us that, enraged by an indiscretion of his son Ham, Noah cursed the descendants of Ham's son Canaan (who were ostensibly black) and damned them to be slaves for eternity.<sup>74</sup> In the American South, many citizens' beliefs were shaped decidedly by this doctrine, and hence they thought that it was God's will for blacks to be enslaved, dehumanized, and reduced to property.<sup>75</sup>

States can increase the legitimacy of a potentially illegitimate property distribution by influencing the population's beliefs about the status quo through stereotypes and doctrines or by other non-material means. States could, for instance, increase a population's political rights in hopes of increasing the state's legitimacy to compensate for the lack of legitimacy of the property distribution. In the southern African states of Namibia, South Africa, and Zimbabwe, this is exactly what happened. In these countries, present-day ownership is sullied by the brooding cloud of past property theft and thus the property distribution is illegitimate.<sup>76</sup> Nevertheless, in the Faustian bargains that led to their independence, all three countries agreed to maintain the illegitimate property ownership status quo in exchange for political equality.<sup>77</sup>

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rationalizing inequality. Lerner (1980) also suggested that people are motivated by the BJW [Belief in a Just World] to see the underprivileged as 'having their own compensating rewards.' In four experimental studies, we obtained support for the notion that exposure to complementary stereotypes exemplars both increases system justification at the explicit level and satisfies the justice motive at the implicit level, relative to noncomplementary stereotypes exemplars [for example, poor and unfulfilled and rich and happy].

*Id.*

73. See DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* 142 (2003) ("In a study of the mythic world of the antebellum South vis-a-vis Blacks, Thomas Peterson showed that the notion of Blacks as 'the children of ham' was a well entrenched belief: White southern Christians overwhelmingly thought that Ham was the aboriginal black man."). For an explanation of the curse of Ham, see *id.* at 168-71 (describing the biblical justification for the eternal curse of slavery imposed on Blacks).

74. See Genesis 9:25-27.

75. See Steven L. McKenzie, *Cursing of Ham/Canaan*, in *THE OXFORD COMPANION TO THE BIBLE* 268 (Bruce M. Metzger & Michael D. Coogan eds., 1993).

76. GIBSON, *OVERCOMING HISTORICAL INJUSTICES*, *supra* note 22 (explaining that even when contemporary white land claims are legitimate, black South Africans are unwilling to accept these claims because of historical dispossessions).

77. See also LUNGISILE NTSEBEZA & RUTH HALL, *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION* 6 (2007) (noting leading Zimbabwean scholar Sam Moyo's view that "[w]ith respect to the former settler colonies which went through a negotiated political transition, such as Zimbabwe, Namibia and South Africa, the legacy of racially unequal land control was by and large maintained at independence in the form of constitutional guarantees such as the protection of existing property rights").

A more specific method of influencing people's beliefs is an LECp, which is differentiated primarily by its focus on the transfer of material goods.

### 3. *Instituting Legitimacy Enhancing Compensation Programs (LECPs)*

Both coercion and influencing people's beliefs do not get to the root of the problem—the distribution of assets. The most effective way for a state to increase its current property distribution's legitimacy is to institute a specific type of compensation program, called a Legitimacy Enhancing Compensation Program (LECP). I define LECP as a compensation program that redistributes assets and strengthens the average citizen's belief that she ought to comply with the law. It is distinct from the usual compensation program in two ways.

First, the *process* of devising and implementing an LECP is crucial because the perceived fairness of the procedures affects an individual's belief as to whether she ought to comply with the law.<sup>78</sup> Several studies have shown that "the key to authoritativeness and legitimacy lies not in judgments about the decisions of an authority, but rather in judgments about the procedure, the process, and the quality of interactions that characterize encounters with authority."<sup>79</sup> Second, with an LECP the fact that compensation is provided is not the final point; instead, the ultimate *effect* of the compensation is key. For example, if the compensation program restores property to the elite in a manner a wide swath of the population views as inconsistent with intuitive views of fairness, there will likely be no legitimacy-enhancing effect.

Within the LECP framework, there are various types of compensation programs that can increase the legitimacy of a state's property distribution, including symbolic reparations, redistribution, reparations, and restoration.

#### a. Symbolic Reparations

An LECP can include *symbolic reparations*. The aim of symbolic reparations is not to rectify past wrongs, but to publicly acknowledge them by building monuments, erecting headstones, renaming streets or public facilities, establishing days of remembrance, securing official apologies, and conducting reburials.<sup>80</sup> But, while symbolic reparation is in many cases necessary, it does not significantly alter the property distribution and so is rarely sufficient to increase the property distribution's legitimacy.

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78. Also it is possible that there will be a different effect on legitimacy if the process includes compensation that is provided by the government as opposed to through the market mechanism.

79. Tyler & Lind, *supra* note 62, at 162-63 (arguing that people are likely to believe that the outcome is legitimate even if it is unfavorable to them, so long as the process involved fair procedures and was conducted by the appropriate authorities). See also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); TYLER, *supra* note 67. In some situations, societal animosity and mistrust may run so deep that the state must involve a third party, such as an international organization, in developing the procedures so that citizens perceive the result as legitimate.

80. See, e.g., Mia Swart, *Name Change as Symbolic Reparation after Transition: The Examples of Germany and South Africa*, 9 GERMAN L.J. 105 (2008).

## b. Redistribution

An LECP can entail redistribution, which *does not* require evidence of prior ownership. This includes redistribution through the tax and transfer system, or land reform where the goal is to target the broader dispossessed group generally as opposed to giving specific compensation to certain dispossessed individuals. There are several examples of redistribution programs where increasing legitimacy was the stated goal. When faced with powerful insurgent movements in the 1970s and 1980s, the governments of El Salvador and Peru tried to increase the property distribution's legitimacy and cultivate popular support for their regimes by enacting agrarian reform.<sup>81</sup> The 1969 land reform in Kerala, India, caused a reduction in inequality in land ownership, income, and caste, thereby increasing the legitimacy of the property distribution.<sup>82</sup>

## c. Reparations

An LECP can include a reparations program,<sup>83</sup> which *requires* evidence of prior ownership. Once a claimant (or her heir) successfully proves that she was unjustly dispossessed, compensation usually comes in the form of restitution of the actual property lost, a grant of alternative property, or monetary compensation.<sup>84</sup> Reparations programs are usually paid for by the taxpaying population and not by the dispossessors or their heirs. Reparations programs have been enacted post Apartheid or Colonialism, post conflict, post Communism, and post Conquest. The following are examples of reparations programs.

In 1994, after the fall of Apartheid in South Africa, the new political dispensation contended with Apartheid-era land theft by enacting the Land Restitution Act. This Act instructs the state to compensate individuals and

communities for their "right in land . . . dispossessed . . . after 19 June 1913 as a result of past racially discriminatory laws or practices."<sup>85</sup>

When civil wars or other violent conflicts occur, property rights are often disrupted, and the post-crisis state may choose either to address or ignore property theft that occurred during the conflict.<sup>86</sup> Kosovo, for example, chose to address past property theft. Prior to the NATO bombing of the region in 1999, thousands of Kosovo Albanians were forced to flee due to a Serbian-led ethnic-cleansing campaign. When the Kosovo war ended, political stability was in part contingent upon the reintegration of refugees and internally displaced people and the return of their property, which had been dispossessed during the war. Consequently, the interim UN-led civilian administration (the United Nations Mission in Kosovo or UNMIK) established a property compensation program. Through this program, any person who was dispossessed of a property right between March 23, 1989, and March 24, 1999, as a result of discrimination, has a right to restitution in kind or compensation.<sup>87</sup>

Several former communist countries in Eastern Europe addressed claims of prior owners as a prelude to or in tandem with their massive privatization programs.<sup>88</sup> In September of 1990, the German government enacted the Law on Settlement of Open Property Questions, which permits return of property that was expropriated by the East German government after 1949 as well as property expropriated by the Nazis between January 30, 1933 and May 8, 1945.<sup>89</sup> In 1991 the Hungarian government passed the First Compensation Law, which provides compensation to property owners who suffered from Communist Era

85. See Restitution of Land Rights Act of 1994 s. 2(1) (S. Afr.) [hereinafter LRA].

86. The state's decision can affect its ability to achieve enduring political reconciliation and hence affects the strength of its democracy for years to come.

87. UNMIK Reg. No. 2000/60, ¶ 2.2, UNMIK/REG/2000/60 (Oct. 31, 2000), available at [http://www.unmikonline.org/regulations/2000/re2000\\_60.htm](http://www.unmikonline.org/regulations/2000/re2000_60.htm).

88. See, e.g., Crowder, *supra* note 3, at 238; Frank, *supra* note 3, at 813 (reviewing communist expropriations in East Germany); Cheryl Gray et al., *Hungarian Legal Reform for the Private Sector*, 26 GEO. WASH. J. INT'L L. & ECON. 293, 309 (1992); Nicolás J. Gutiérrez, Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT'L L. 111 (1995) (reviewing restitution programs in Baltic Republics, Bulgaria, Romania, Czech Republic, Slovakia, East Germany, Hungary, Poland, and Nicaragua); Heller & Serkin, *supra* note 7, at 1402; Jose Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 344-53 (2000) (reviewing restitution programs in the Baltic Republics, Germany, Hungary, Czech Republic, Slovakia, East Bulgaria, and the program still being created in Poland); Katherine Verdery, *The Elasticity of Land: Problems of Property Restitution in Transylvania*, 53 SLAVIC REV. 1071 (1994) (discussing how the post-communist Romanian government enacted legislation in 1991 to compensate former owners, who lost their land in forcible collectivization).

89. Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INT'L L.J. 243, 257-60 (1993).

81. Repressive state violence, however, undermined the effects of the massive redistribution. If redistribution occurs concomitantly with repressive state violence, the state's illegitimate use of violence can counteract the legitimacy brought about by redistribution. See T.R. GURR, *WHY MEN REBEL* 238 (1970) ("The threat of severity of coercive violence used by a regime increases the anger of dissidents, thereby intensifying their opposition, up to some high threshold of government violence beyond which anger gives way to fear."); Mark Lichbach, *Deterrence or Escalation? The Puzzle of Aggregate Studies of Repression and Dissent*, 31 J. CONFLICT RESOL. 266, 269 (1987) (quoting T.H. GREENE, *COMPARATIVE REVOLUTIONARY MOVEMENTS* 112 (1974)) (noting that if citizens perceive that the state is arbitrarily using violence against them, then this will lower the government's legitimacy and increase the chances of political instability); T. David Mason, "Take Two Acres and Call Me in the Morning": *Is Land Reform a Prescription for Peasant Unrest?*, 60 J. POL. 199, 199 (1998) (noting that in both Peru and El Salvador "repressive violence by the state undermined the remedial effects of land reform on popular support for the regime").

82. Richard W. Franke, *Land Reform Versus Inequality in Nadur Village, Kerala*, 48 J. ANTHROPOLOGICAL RES. 81, 87 (1992).

83. Reparations is compensation that *does not* focus on repairing a relationship to society by giving the dispossessed a choice in how she is compensated. See Atuahene, *From Reparation to Restoration*, *supra* note 7, at 1444-45.

84. See *id.* at 1445.

expropriations;<sup>90</sup> and in 1992 the government passed the Second Compensation Law, which mandates compensation for Jews dispossessed by Nazi Germany as well as ethnic Germans expelled from Hungary in the wake of the Nazi retreat.<sup>91</sup>

Post-Conquest, many countries have enacted restitution programs to make amends for lands stolen from Native Peoples. In Australia the Aboriginal Land Rights (Northern Territory) Act of 1976 provided a twenty-year period (1976–1996) in which the state allowed Aboriginal people to make a collective property claim to Crown land, which was stolen from them during Conquest. If an Aboriginal group could prove traditional ownership, then it was entitled to receive an inalienable freehold title held by a corporate land trust.<sup>92</sup>

While the reparation programs in countries like South Africa, Kosovo, Germany, Hungary, and Australia have successfully given individuals and communities compensation for property stolen from them in the past, this does not necessarily mean that they are LECs. The process used to distribute compensation as well as the effect of the compensation is what defines an LEC. I have elsewhere theorized about how a state can best ensure its compensation program has a significant legitimacy-enhancing effect.<sup>93</sup> I argued that states must implement programs focusing on restoration as opposed to reparation.

#### d. Restoration

In prior work, I have argued that there are certain instances in which property theft leads to severe dehumanization and removal of individuals and communities from the social contract.<sup>94</sup> In these instances, in order to significantly increase the property distribution's legitimacy, the state should provide compensation in the form of restoration. *Restoration* is compensation that gives individuals and communities an array of options that allow the dispossessed to offer input on how they are to be compensated and thereby reintegrated into the social contract.<sup>95</sup> In contrast, reparation is not as effective in enhancing legitimacy because it does not prioritize choice. The choices for restoration range from

90. Istvan Pogany, *The Restitution of Former Jewish-Owned Property and Related Schemes of Compensation in Hungary*, 4 EUR. PUB. L. 211 (1998).

91. Gutiérrez, *supra* note 88, at 132.

92. Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.). The Act was a radical departure from the *Milirrpum* case, which required an economic attachment to the land in order to make a property claim. Most claims were exceedingly difficult to establish. By the end of the twenty-year period, Aboriginal people possessed 43% of the Northern Territory (where 15% of the Australian Aboriginal population lived). Lewis P. Hinchman & Sandra K. Hinchman, *Australia's Judicial Revolution: Aboriginal Land Rights and the Transformation of Liberalism*, 31 POLITY 23, 37 (1998).

93. See Atuahene, *From Reparation to Restoration*, *supra* note 7, at 1445.

94. See *id.* (arguing that property-induced invisibility is the widespread or systematic confiscation or destruction of real property with no payment of just compensation executed such that dehumanization occurs. The act is perpetrated by the state or other prevailing power structure(s) and adversely affects powerless people or people made powerless by the act such that they are effectively left economically vulnerable and dependent upon the state to satisfy their basic needs. When property is confiscated in this manner, then people are removed from the social contract).

95. *Id.* at 1445–46.

restitution of the actual property lost, grant of alternative property, monetary compensation, or distribution of in-kind benefits such as free higher education for two generations, priority in an already established housing process, or highly subsidized credit, for example.<sup>96</sup>

In theory, the South African Land Restitution Program is the best example of a true restoration program. Beneficiaries of the LRP were to receive a choice in how they were compensated. The White Paper on Land Policy—the government's definitive policy on land matters—states that “solutions must not be forced on people.”<sup>97</sup> In reality, however, many beneficiaries were not given a choice due to time constraints and lack of prioritization. Most commonly, the government gave people only one option—financial compensation.<sup>98</sup>

In sum, when a state is faced with an illegitimate property distribution, an LEC is at times more effective in maintaining long-term stability than the state's other two options—coercion and changing beliefs. When illegitimacy runs high, relying purely upon coercion to secure compliance involves high surveillance and enforcement costs.<sup>99</sup> Influencing the population's beliefs about the property distribution is possible, but it does not address the root of the illegitimacy—pervasive material inequality. In order to most effectively address material inequality in a manner that will promote long-term stability, states should utilize an LEC.

### IV. A LEGITIMACY DEFICIT: A RATIONAL-CHOICE MODEL

#### A. To Prevent Property-Related Disobedience, a State Should Enact an LEC Before It Enters a Legitimacy Deficit

A legitimacy deficit is a rational-choice model that suggests when a state should implement an LEC to avert property-related disobedience. I employ the assumption of rationality because I seek to describe what rational, informed decisionmakers primarily interested in maintaining stability in the face of pervasive past theft ought to do; I do not seek to make any claims about what they will actually do.<sup>100</sup> The value of the model is threefold: it gives conceptual clarity

96. *Id.*

97. S. AFRICAN DEP'T OF LAND AFFAIRS, WHITE PAPER ON SOUTH AFRICAN LAND POLICY 49 (1997).

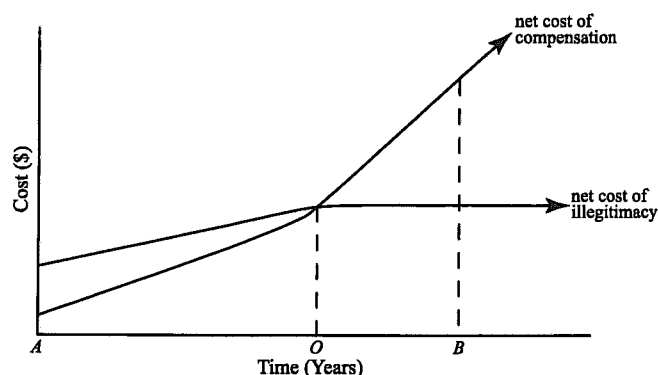
98. Interview with Tozi Gwanya, Dir. Gen. of Land Affairs, in Johannesburg, S. Afr. (July 8, 2009).

99. Hurd, *supra* note 18, at 384.

100. I assume that the relevant decisionmakers are rational agents who engage in expected utility maximization. That is, when agents are confronted with a range of options they are able to rank-order their preferences, taking into consideration the probability of achieving each one, and choose the most efficient means to their desired end. For more on the general contours of rational-choice theory, see Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705 (1995). There is a substantial literature critiquing rational-choice theories that primarily challenges their predictive power because people often act irrationally. For an argument that the predictive power of rational-choice theory is limited because the rational man is not a psychologically realistic portrait of an average person, see, for example, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

to the question of how a state can avoid property-related disobedience in the face of extensive past property theft; it provides citizens, policymakers and academics a framework within which they can identify and debate the various costs and benefits involved; and it provides a flexible framework that can apply to a wide array of contexts and time periods.

Figure 1



The symbolic representation of the model is as follows:

$C_i$  = Net cost of illegitimacy

$C_c$  = Net cost of compensation

When

$C_c < C_i$ , then LECP is suggested

$C_c = C_i$ , then LECP is suggested

$C_c > C_i$ , then status quo is possible

Point A in Figure 1 represents the point when the original property theft occurred. A stable status quo exists between point A and point O, where the cost of an LECP is greater than the cost of an illegitimate property distribution. When there is a stable status quo, addressing past property theft may be morally prudent or wise for a variety of reasons, but failure to address past property theft will not lead to massive noncompliance with property laws or breed broader instability that could possibly upend a state.

A rational decisionmaker should enact an LECP before the state reaches a legitimacy deficit. A legitimacy deficit exists between point O and point B, where the cost of an illegitimate property distribution outweighs the cost of an LECP. Between points O and B, the cost of illegitimacy rises because—due to the present effects of pervasive past property theft—the average citizen maintains only a weak belief that she *ought to* comply with property-related laws, and *actual* compliance is low based on this pervasive belief. There is convincing experimental evidence from legal psychology that suggests if people perceive one law as unjust, then this

can adversely affect their willingness to comply with unassociated laws.<sup>101</sup> B is the point at which property-related disobedience inspires broader instability and finally destabilizes the state. The situation intensifies as a society approaches point B, placing enormous pressure on a state either to act or to face political or economic destabilization as a result of its inaction.

The time it takes one country to move from point A to point B as well as the construction of the cost curves depends upon unique, local circumstances. The legitimacy deficit model is not designed to predict when  $C_c < C_i$ . Rather, the model is designed to determine what a country should do once, for whatever reason,  $C_c < C_i$ .

### 1. Net Cost of Illegitimacy

The net cost of an illegitimate property distribution is the cost of illegitimacy ( $C_i$ ) minus the benefit of illegitimacy ( $B_i$ ), which can be symbolically represented as follows:  $F(C_i) = (\text{ability to coerce}) (\text{coercive force available}) + (\text{costs related to non-material influencing of beliefs}) + (\text{remaining disobedience}) - B_i$ .

The primary benefit of an illegitimate property distribution is the ability to maintain the political and economic support of all those who are benefitting from the status quo. There is also, of course, the costs saved from not having to implement an LECP. But, the cost of doing nothing and maintaining an illegitimate property distribution can lead to varying levels of property-related disobedience. The level of disobedience depends upon the political and economic power of the dispossessed group, their percentage of the population, and their ability and incentive to organize disruptive protest actions.

The cost of illegitimacy declines as the impetus to rebel is reduced. This could be because organized opposition to the unjust dispossession is suppressed as time moves on; memories fade and the unfairness of the unjust dispossession no longer causes people to disobey property laws; or people's beliefs are influenced through stereotypes or doctrines such that the past property theft is no longer an impetus for noncompliance.

The net cost of an illegitimate property distribution will rise if a state must spend money on institutions or propaganda that facilitate the population's acceptance of a highly unequal property distribution. The net cost will rise more dramatically when there is systematic noncompliance with property-related laws and the state is forced to employ its coercive mechanisms. Coercion depends on two factors: a state's political ability to use coercion and the availability of coercive force. A state's political ability to use coercion depends upon the existence of constitutional or other legal restraints. The United States, for example, is not legally allowed to engage in activities that amount to torture; this serves as a restraint on the permissible responses to noncompliant actors. In North Korea, however, no such legal restraint exists. Also relevant is the level of support or condemnation for using coercion among domestic and international constituencies. A rational decisionmaker should not use coercive power such that the push back

101. Nadler, *supra* note 10, at 1407.



from domestic or international actors will knowingly cause it to lose significant political capital. The availability of coercive force involves the capacity of existing institutions such as the police and military. It entails the affordability of weapons, surveillance apparatus, and other tools used to establish control.

The cost of coercion increases in accordance with the disobedient actors' level of disregard for law and their use of violence. There may come a point, however, when the state's coercive powers are not sufficient to contain disobedient populations, resulting in property-related rebellion that can escalate to complete state destabilization (Point B). While the fabric of society can withstand losing a few threads, once frayed extensively the fabric can do nothing but fall apart.

## 2. Net Cost of an LECF

The net cost of an LECF is the cost of compensation ( $C_C$ ) minus the benefit of compensation ( $B_C$ ), which can be symbolically represented as follows:  $F(C_C) = (\text{direct payments}) + (\text{administrative costs}) + (\text{consequences of perceived process illegitimacy}) - B_C$ .

The primary benefit of an LECF is that if it is done correctly, it will increase the property distribution's legitimacy and drastically decrease the chance that past property theft will cause property-related disobedience.

The cost of an LECF includes several factors. First, the most financially taxing costs are direct payments to present landowners and past victims. Under no circumstance is it acceptable to expropriate the land of innocent third parties without just compensation.<sup>102</sup> Hence, many compensation programs provide present landowners with monetary compensation when the dispossessed elect to regain their land. But if the original land is not returned, the programs provide the dispossessed with alternate land, monetary compensation, or some other form of compensation.<sup>103</sup> The cost of compensation will rise along with inflation or

increasing land values. The cost of compensation also escalates if the state has to pay just compensation to expropriate the land, but it will not increase as much if the state can distribute state-owned land.

Second, there are administrative costs involved in reallocating property rights. This includes the cost of establishing a bureaucracy, or adding work to an existing bureaucracy.<sup>104</sup> Establishing an administrative apparatus requires significant upfront investment. For restitution programs, the cost of compensation increases as time progresses and evidence of prior ownership becomes more difficult to secure. Administrative costs are also affected by rent-seeking behavior within bureaucracies, which can drastically reduce the compensation's legitimacy-enhancing effects and undermine the entire effort. The worst case scenario is if the compensation is siphoned off by corrupt officials and never reaches the targeted beneficiaries.

Third, there are significant costs if certain populations do not believe that the LECF or the process by which it is implemented is fair or efficient. For instance, there are the costs of disobedience and instability that may result if the ostensible unfairness awakens or amplifies preexisting ethnic or religious divisions and rancor.<sup>105</sup> Alternatively, entrenched interests (such as the military or economic elites) who vehemently oppose the LECF can take up arms or instigate chaos. There is also the potential cost of bringing in a neutral third party to administer the LECF so that the populace believes that the process and procedures are fair.<sup>106</sup> Additionally, there are costs involved if, in response to market uncertainty created by the LECF, investors pull out of the country before reallocation of property rights is complete.<sup>107</sup> There are also costs when a foreign state withholds necessary humanitarian or economic financing, suspends diplomatic privileges, or initiates or

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*Legal Dimension*, 24 VAND. J. TRANSNAT'L L. 305, 308 (1991) (explaining the Czech Republic and Slovakia restitution programs, which provide for the return of a small portion of the private property to its original owner or compensation if physical restitution is not feasible due to the property's destruction, irrevocable alteration, or improvement through use).

104. See Dodson & Heiskanen, *supra* note 103, at 233 (concluding Kosovo's restitution program lacks the necessary large-scale administrative institutions, staffing, information technology facilities and other resources to fulfill the required need because there is not sufficient funding from the international community); Fieberg, *supra* note 103, at 84 (discussing the administrative constraints of implementing East Germany's restitution programs, which required thousands of employees); Hall, *supra* note 9, at 219 (noting that national budgets cannot meet the demands of restitution-related costs).

105. See *supra* note 13 and accompanying text.

106. International and regional organizations may fill this role at no cost to the state (e.g. Kosovo).

107. See Stijn Claessens & Luc Laeven, *Financial Development, Property Rights, and Growth*, 58 J. FIN. 2401, 2402-03 (2003) (finding secure property rights increase a firm's willingness to allocate resources to property, which in turn leads to overall economic growth); Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 575 (2002) (finding an inverse relationship between the willingness of farmers to invest in long-term improvements on their land and the perception of insecurity based on land reform in flux in Ethiopia).

102. In South Africa, for instance, the state considers various factors when determining just compensation including "the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation." S. AFR. CONST. 1996 s. 25(3). Also, every state must decide who is an innocent third party.

103. See Alan Dodson & Veijo Heiskanen, *Housing and Property Restitution in Kosovo*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 225, 233 (Scott Leckie ed., 2003) (noting Kosovo's Regulation 2000/60 provides for three categories of claims and a successful category A claimant will receive restitution of the property right lost or compensation, depending on the circumstances); Gerhard Fieberg, *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question*, in CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY 79, 84 (Medard R. Rwelamira & Gerhard Werle eds., 1996) (describing the debate between East and West Germany over the two options for land reform: restitution in kind, meaning the government returns the confiscated assets, or compensation through a payment of money); Hall, *supra* note 9, at 217 (describing the South African policy which allows the claimants to return to their land or opt for cash compensation or other forms of redress); Vraitislav Pechota, *Privatization and Foreign Investment in Czechoslovakia: The*



funds an aggression in response to an LECP it perceives as illegitimate. In Nicaragua, for instance, the Sandinista government faced adamant opposition from the United States when it implemented an LECP. The United States funded a military insurgency (the CONTRAS), in part to prevent the onset of socialism and a massive redistribution of property.<sup>108</sup> Consequently, the Sandinista land reform program was compromised because the state had to spend a significant portion of its budget on military operations, leaving scarce funding for its land reform program.<sup>109</sup>

### 3. The Model's Descriptive Power

The cost curves in Figure 1 are informed by factors such as: how long ago the property theft occurred; the continuing effects of the past property theft; the current political relevance of the past property theft; and the value of land in relation to other forms of wealth. They are also informed by various facts about the dispossessed and the dispossessors, including population size, continued identifiability, and current political and economic power. While there are various ways to graphically represent the costs, I base my analysis upon the graph shown in Figure 1, which tells a particular story. This story has four pillars: as time progresses the cost of illegitimacy rises; only years after the initial theft is the cost of compensation equal to the cost of illegitimacy (point *O*); prior to point *O*, the cost of compensation is greater than the cost of illegitimacy; and after point *O*, the cost of illegitimacy is greater than the cost of compensation. This is arguably the story of southern Africa.

Even prior to the nineteenth century, the ascendant white regimes in Namibia, South Africa, and Zimbabwe brutally confiscated vast acres of land without compensation or consent.<sup>110</sup> The white minority's sophisticated military apparatus overwhelmed those Africans who tried to rebel against this injustice. Aware of their military disadvantage, Africans generally accepted their fate and widespread rebellion did not materialize until the latter half of the twentieth century. Because property-related disobedience and other forms of noncompliance were low during the zenith of white rule, the cost of illegitimacy was low.

108. Abu-Lughod, *supra* note 9, at 32; Everingham, *supra* note 9; Philip J. Williams, *Dual Transitions from Authoritarian Rule: Popular and Electoral Democracy in Nicaragua*, 26 COMP. POL. 169, 177 (1994).

109. W. Gordon West, *The Sandinista Record on Human Rights in Nicaragua*, 22 DROIT ET SOCIÉTÉ 393, 401 (1992) ("In response, whereas Nicaraguan military spending constituted only 7% of the 1980 and 1981 national budgets, the figure had to rise through 13% (1982), 19% (1983), 25% (1984) to about 50% since.").

110. See, e.g., CATHERINE BUCKLE, AFRICAN TEARS: THE ZIMBABWE LAND INVASIONS (2001); Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980-1990*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA (Margaret C. Lee & Karen Colvard eds., 2003); SIDNEY HARRING & WILLEM ODENDAAL, 'ONE DAY WE WILL ALL BE EQUAL': A SOCIO-LEGAL PERSPECTIVE ON THE NAMIBIAN LAND REFORM AND RESETTLEMENT PROCESS, LEGAL ASSISTANCE CENTER 9, 19, 33 (2002). See also Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra*; Margaret Lee, *The Rise and Decline of the Settler Regimes of South Africa, Namibia, and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra*.

During this period, the cost of compensation was higher than the cost of illegitimacy. If the white government had given Africans compensation for past theft, it would have severely undermined the white supremacist logic on which it was founded, deeply alienated its political base, and threatened its political survival. That is, the cost of perceived process illegitimacy was very high. Thus, from the perspective of the apartheid government, it was arguably more rational and less costly to invoke its military might than to aggressively pursue equitable policies.

When the countries in the region attained political independence, the cost analysis changed dramatically. Although the connection between past land theft and present inequality is palpable and undeniable,<sup>111</sup> Zimbabwe, South Africa, and Namibia all made bargains when independence was granted, allowing whites to keep their property regardless of how it was attained, and in exchange receiving political liberation and the promise of land reform. Over a decade after independence was granted, the promise of land reform remains largely unfulfilled despite the intense economic and cultural importance of land in these societies.<sup>112</sup> Consequently, among South Africa's populace there is a generalized belief that the dispossessors remain rich while the dispossessed remain poor; this serves as a source of a widespread, visceral anger and a pounding sense of injustice.<sup>113</sup> As demonstrated in Zimbabwe, a demagogue can hasten a country's arrival at point *B* and cause things to fall apart by manipulating this profound sense of illegitimacy to serve his interests at the expense of the common good.<sup>114</sup>

While the highly unequal land distribution and severe inequality remain largely unchanged in South Africa and Namibia since independence, the states'

111. J.S. Juana, *A Quantitative Analysis of Zimbabwe's Land Reform Policy: An Application of Zimbabwe SAM Multipliers*, 45 AGREKON 294, 294 (2006) ("During the colonial era, land was distributed on racial lines, with approximately 4,660 large-scale predominantly white commercial farmers owning about 14.8 million hectares and about 6 million black smallholder farmers owning about 16.4 million hectares in mainly low agricultural potential areas."); Uazuva Kaumbi, *Namibia: The Land is Ours!*, NEW AFRICAN 28 (2004) ("[L]ess than 10% of the people own more than 80% of the commercial farmland as a result of colonial theft."); Johan van Rooyen & Bongiwe Njube-Mbuli, *Access to Land: Selecting the Beneficiaries*, in AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKET AND MECHANISMS 461 (Johan van Zyl et al. eds., 1996) ("Land distribution in South Africa is highly skewed. Approximately 87 per cent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 per cent of the population, which is predominantly black, live on 13 per cent of the land in high density areas—the former homelands.").

112. *Id.*

113. See Atuahene, *From Reparation to Restoration*, *supra* note 7, at 1453-56 (describing the history of land dispossession in South Africa that left the majority of the Blacks powerless and poor and the present-day consequences, including a widespread belief among Blacks of the illegitimacy of the current land distribution). See also AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 6-7 (2003) (noting that the unequal distribution of wealth "pit[s] a frustrated 'indigenous' majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority"). See also GIBSON, OVERCOMING HISTORICAL INJUSTICES, *supra* note 22, at 31.

114. *Id.*

ability to use coercion to suppress property-related disobedience has decreased dramatically because of the majority's newfound political rights. As the euphoria of political independence wears thin and the promise of land reform remains elusive, the dispossessed majority becomes impatient, rebellion becomes more likely, and the cost of illegitimacy increases. Consequently, post-independence, the cost of illegitimacy is gradually becoming greater than the cost of compensation.

Although my analysis is primarily based on the story of South Africa, in the Appendix I outline various scenarios that would cause the cost curves to assume a different shape than in Figure 1. I leave it to other scholars, however, to apply the model outside of the southern African context and investigate whether each of the four patterns in the Appendix accurately tells the story of a different region or country.

#### 4. The Model's Constraints

The model's first major constraint is that determining the relevant costs over time is difficult (but not impossible). In order to draw the diagram for any particular country, one must know how the net cost of compensation and illegitimacy decreases or increases over time and at what pace. This is difficult because the model is not limited to quantifiable, market-related costs, so a precise, technical cost-benefit balancing is not possible. But, it is possible to provide qualitative descriptions of the costs that are comprehensible to the general public.<sup>115</sup> In the next Section, I argue that the most effective way to properly determine costs is through a highly participatory procedure involving a broad swath of the polity.

The model's second limitation is that because its focus is solely stability, it overlooks the fact that there are morally unsavory dictatorships that have a high degree of stability. In North Korea, for example, there is no evidence of property-related instability or even widespread disobedience. My analysis is purely focused on promoting a stable society, and thus does not deal with the morally troubling means that the North Korean government may use to ensure stability. Although the legitimacy deficit model only deals with promoting stability, it is still valuable because it provides conceptual clarity to a very important question faced by several transitional democracies about how a state can avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft.

Lastly, under the model, groups that are willing to use violence in response to a property distribution that they perceive as illegitimate are more likely to receive compensation regardless of the moral strength of their position. Consider the hypothetical country of *Ai*, in which 5% of the population owns over 80% of the land. This minority population engaged in morally abhorrent activities

115. Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 293-94 (arguing costs that are not commensurable along a single metric are difficult to balance). Sunstein urges the U.S. Congress to accompany all cost-benefit analysis with a "disaggregated, qualitative description of the consequences of government action, so that Congress and the public can obtain a fuller picture than the crude and misleading precise 'bottom line' of the cost benefit analysis." *Id.*

for twenty years in an ultimately unsuccessful attempt to maintain their economic power. Under the new political dispensation of *Ai*, most of the minority population's land is expropriated without compensation. As a result, the former landowners believe that the property distribution is illegitimate and, more importantly, are willing to use violence to get their land back. As noted earlier, violence increases the cost of illegitimacy. If the cost of illegitimacy outweighs the cost of an LECP, then under the stipulations of the model, a rational leader should provide compensation to the minority despite the moral weakness of the claim. The cost of illegitimacy for a similarly situated group that is *not* willing to engage in violence would be lower. Hence, one major limitation of the legitimacy deficit model is that it can reward violence. In certain situations when the decisionmakers balance the cost of the illegitimacy against the cost of an LECP, a given group's potential for violence may increase their chance of securing an LECP. But, while promoting stability can have such moral costs, it is still a worthy end.

#### B. The State Should Use a Highly Participatory Process to Properly Understand the Costs Involved

The legitimacy deficit model requires qualitative descriptions of the costs and their importance. This may seem inadequate when compared to other models where the costs are quantifiable; but, although quantifiable costs may seem more accurate, often the process of assigning monetary values can be imprecise and arbitrary. To ensure that the costs involved in the legitimacy deficit model are an accurate reflection of citizen perceptions, I propose that decisionmakers determine and balance the costs through a highly participatory process involving various sectors of the populace.

The importance of involving the public in the political decision-making process is largely undisputed in the literature.<sup>116</sup> But the level of control the public should have in the decision-making process is a very controversial matter.<sup>117</sup> At the very basic level, which I will call level one, power holders aim to educate the public about options, rights, and responsibilities, but information flows in one direction.<sup>118</sup> This is not true participation. Level two involves token participation from certain participants who are informed or consulted, but the present power holders are not forced or inclined to truly integrate the knowledge and suggestions of these participants.<sup>119</sup> Alternatively, a few handpicked citizens who are not accountable to their communities may be invited to join a decision-making body. In both situations, the community has no true opportunity to decide. True participation occurs at level three when participants have a significant amount of control over both the process and outcome.<sup>120</sup>

116. Ortwinn Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189, 189 (1993).

117. *Id.*

118. Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASS'N 216, 217 (1969).

119. *Id.*

120. *Id.*

As it stands now, in many nations the cost involved in a legitimacy deficit are balanced by an elite group, which usually consists of political parties, the experts they rely upon, and individuals and institutions highly capable of influencing politics. This is a significant problem because the outcome of a cost analysis depends on who is doing the analysis. The costs as perceived by a ruthless dictator may be different than those perceived by an accountable, democratically elected government, or by the populace at large. The costs as perceived by the rich, who have an economic buffer, are different than the costs as perceived by the poor. Also, if unchecked, decisionmakers will likely weigh the immediate costs involved more heavily than costs that will be incurred down the road because politicians often face formal or informal term limits that incentivize them to sacrifice long-term success for short-term benefit. If given free reign, decisionmakers may also fail to consider the total net costs involved and only focus on the costs relevant to politically or economically powerful groups that pose a threat to their power.

In South Africa's Land Restitution Program, both the decision to compensate only those who were dispossessed of a right in land after 1913 and the process the state used to compensate citizens involved primarily political parties and experts, with limited direct consultation with average citizens.<sup>121</sup> Likewise, after the Kosovo War, international actors did not extensively consult average citizens when they decided to provide compensation "to any person who was dispossessed of a property right between March 23, 1989 and March 24, 1999 as a result of discrimination."<sup>122</sup> Because the processes in both Kosovo and South Africa failed to secure significant involvement from a broad cross-section of citizens, the decisionmakers did not have all the information they needed to determine and balance the costs appropriately. In fact, the most important piece of the puzzle was left out: average citizens' beliefs about the correct outcome. It is possible for elite decisionmakers to properly gauge a population's preferences, but success is more likely if they go straight to the source—the people.

States must determine whether a legitimacy deficit exists and what type of LECP is necessary to correct it through a highly participatory procedure involving a broad swath of the polity. I am not suggesting that the goal of the conversation should be to achieve full consensus; this would be highly impractical given the various conflicting interests involved. Rather, the goal should be to allow people to participate in assessing the need for an LECP and in designing it. Empirical studies done by Tom Tyler confirm that if people have a say in the process they are more likely to view the outcome as fair.<sup>123</sup> Consequently, if a

121. A.J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in PROPERTY AND THE CONSTITUTION 109, 111–12 (Janet McLean ed., 1999) (describing the initial debates regarding the inclusion of the property clause in 1993 and 1995, that "constitutional entrenchment of property rights would 'insulate' existing landholdings against land reform efforts" and noting that, despite these concerns, the property clause was inserted in the constitution and that "the absence of any real political debate about the legitimacy and potential effects of a constitutional property clause suggests the existence of a political compromise that was never open to real debate or negotiation").

122. See UNMIK Reg. No. 2000/60, *supra* note 87.

123. See TYLER, *supra* note 67.

broad cross-section of the population is involved in a well-regarded process to determine if a legitimacy deficit exists and to design an LECP to address it, then they are more likely to view the resulting LECP as fair. An LECP that includes a broad constituency and takes particular pain not to exclude those who can unsettle the social order can increase legitimacy and inspire willing obedience to property-related laws. Without widespread participation, it is likely that a few well-organized groups will implement an LECP only if it suits them and they will design it according to their preferences. This is not likely to have the legitimacy-enhancing effects necessary to avert property-related disobedience.

There are several benefits as well as drawbacks to mandating widespread public participation. The downsides are, first, that the process can become time-consuming given the number of people who should be involved and the challenges of synthesizing the information received. This is particularly problematic for states that have a narrow window of time in which to avoid property-related rebellion. But, by using participatory procedures, the state makes an investment of time at the front end and will receive the dividends—potentially saving the state from chaos—at the back end.

Second, meaningful public participation of the envisioned magnitude requires significant resources, which creates a problem for cash-strapped states in or approaching a legitimacy deficit. This is why it is crucial for states to involve civil society and international organizations in managing the process, a step that both reduces state expenditures and increases transparency.

Third, making room for public participation in deciding whether to provide compensation for past property theft requires a government that is ethical and transparent, with a reasonably efficient bureaucracy and the political will to get the job done. This exists in some countries facing a legitimacy deficit, but not in others.

Fourth, facilitating a conversation that balances participation and deliberation is difficult because high participation has the potential to undermine deliberation. The crux of the deliberation-participation paradox is that, although it is difficult to thoroughly discuss issues in a large group, if the state chooses community representatives, there is no guarantee that those people will be accountable to, or representative of, the larger public.

Fifth, a public conversation about past property theft could open the proverbial can of worms and inflame extant divisions and ethnic or religious-based hatred that may lurk just below the surface. While talking about past injustices has the potential to cause latent animosities to boil up to the surface, this is not necessarily a bad thing. If past injustice is the root of the ethnic resentment, then an LECP with widespread buy-in has the potential to address the root cause and possibly assuage ethnic rancor.<sup>124</sup>

Sixth, the very thing a public conversation is intended to address—a lack of legitimacy—may prevent people from participating in the

124. If, however, the LECP does not have widespread buy-in and does not increase legitimacy, a public conversation could be antagonistic to stability.

decision-making process. But the literature on public participation tells us that "[c]itizens usually want to be involved only when they have strong feelings on an issue or when a decision will affect them directly."<sup>125</sup> A state's decision to implement or not implement an LECP is something potential beneficiaries would be directly affected by, so participation would be likely if the population did not view the LECP process as a farce.<sup>126</sup>

Lastly, and most problematically, even if a state manages to facilitate a meaningful public conversation, there is no guarantee that the output of the conversation will affect the ultimate decision. The entire process can devolve into a propaganda campaign designed to give the illusion of power sharing when in actuality it is business as usual and the decisions are made by those in power with no regard for what average citizens believe or desire.

Nonetheless, there are still significant benefits to prioritizing public participation in the process of determining and balancing the costs involved in a legitimacy deficit.<sup>127</sup> First, democracy is strengthened when people participate in deciding issues that directly affect them. For John Stuart Mill:

[I]t is at local level where the real educative effect of participation occurs, where not only do the issues dealt with directly affect the individual and his everyday life but where he also stands a good chance of, himself, being elected to serve on a local body. It is by participating at the local level that the individual 'learns democracy'. 'We do not learn to read or write, to ride or swim, by being merely told how to do it, but by doing it, so it is only by practicing popular government on a limited scale, that the people will ever learn how to exercise it on a larger [scale].'<sup>128</sup>

By participating in the decision-making process informed by the legitimacy deficit model, average citizens practice democracy.

Second, true participation results in a devolution of power to average citizens, hence serving as a check on the power of traditional decisionmakers.

125. JOHN CLAYTON THOMAS, PUBLIC PARTICIPATION IN PUBLIC DECISIONS: NEW SKILLS AND STRATEGIES FOR PUBLIC MANAGERS 56 (1995).

126. In some instances participants are paid a small stipend to incentivize them to participate. See Carl Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U. L.Q. 1101, 1156-64 (1986) (noting the virtues and vices of providing participant compensation in the U.S. experience).

127. In the 1960s the virtues of citizen participation led legislators to mandate that agencies involve the public. See Walter Rosenbaum, *The Paradoxes of Public Participation*, 8 ADMIN. & SOC'Y 355, 357 (1976) ("First came the Economic Opportunity Act (1964) with its unprecedented congressional mandate, as nebulous as it was controversial, that the Office of Economic Opportunity (OEO) achieve 'maximum feasible participation' among the poor in the Community Action Programs; next came the Demonstration Cities Program (1966) with its insistence that HUD 'organize the unorganized'—the poor most often affected by the program.").

128. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 31 (1970).

Third, a public conversation can help to ground citizens' expectations in reality. Some countries cannot afford an extensive LECP, so the conversation can provide people with information about exactly what resources are available to implement a compensation program and what kind of programs a state can offer given its limited resources.

Fourth, decisionmakers will have better information if the decision-making process includes direct citizen participation. Increasing legitimacy depends on impacting what a wide cross-section of the citizenry believes, so the best information will come straight from the source—the citizens. Lastly, public participation, which gives citizens some control over the decision-making process, is likely to make citizens believe that the process is fairer than if they did not participate in it. The evidence shows that "the opportunity to express one's opinions and arguments, the chance to tell one's own side of the story, is a potent factor in enhancing the experience of procedural justice, even when the opportunity for expression really accomplishes nothing outside the procedural relationship."<sup>129</sup> Studies have even shown that process control is often more important than decision control with respect to procedural justice judgments.<sup>130</sup>

Each state should structure the public participation in balancing the costs of a legitimacy deficit according to its idiosyncratic political, social, and economic circumstances. There is no one-size-fits-all approach. There are, however, broad guiding principles that each state should use to decide who will be involved and how the process will unfold.

129. Tyler & Lind, *supra* note 62, at 149; see also Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977); Ruth Kanfer et al., *Fairness and Participation in Evaluation Procedures: Effects on Task Attitudes and Performance*, 1 SOC. JUST. RES. 235 (1987); Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531 (1978); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980); E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. APPLIED SOC. PSYCHOL. 338 (1983) [hereinafter Lind et al., *Decision Control*]; Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987); Tom R. Tyler et al., *The Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985); Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295 (1974).

130. D.E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085 (1989) (procedural justice judgments were more affected by a subject's belief that their position had been considered than a favorable outcome); Lind et al., *Decision Control*, *supra* note 129, at 338; Linda Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223 (1983); Tyler, *supra* note 129, at 333 (noting that, when the decisionmaker was seen as acting in bad faith or biased and even when the outcome was important, process control positively affected procedural justice judgments; process control, however, did not edify procedural justice judgments when the decisionmaker was seen as not giving consideration to the respondent's views); Tyler et al., *supra* note 129, at 72.

### 1. Who Will Be Involved in the Process?

The type of public participation envisioned in this Article requires the state to use a bottom-up approach for defining the relevant public. These may include stakeholders such as political parties, bureaucrats, community organizations, citizens, and experts.<sup>131</sup> To ensure that there is significant buy-in, the state must include both organized groups as well as citizens not affiliated with particular groups.<sup>132</sup> Before inviting organized groups, however, the state must understand how democratic each group is and whom each one represents:

An almost universal finding in participation studies is that groups or individuals active in such programs (1) represent organized interests likely to have been previously active in agency affairs, (2) include a large component of spokesmen for other government agencies, (3) represent a rather limited range of potential publics affected by programs, and (4) tend toward the well-educated, affluent middle- to upper-class individuals.<sup>133</sup>

States must be sure to avoid these well-trodden pitfalls and encourage public participation from a diverse, wide-ranging group of stakeholders.

### 2. How Will the Process Unfold?

There are several ways to manage the public's participation. Each state should draw upon successes in other localities. One example where a state body successfully achieved the correct balance between participation and deliberation was in the process employed by the Corpus Christi municipality to define the long-term goals of the city:<sup>134</sup>

First, a representative fourteen-person steering committee was formed to oversee the entire process. That committee then selected a larger committee "of approximately 100 persons representing a cross-section of the ethnic, sex, age, socioeconomic and leadership composition of the population," a committee that in turn was divided into subcommittees for different goal areas. As discussion progressed, subcommittee members visited other community groups to publicize the evolving goals. Finally, a community vote on various goals was solicited through mail-in ballots published in the city's newspapers. To increase interest in voting, on the day of the vote local television stations broadcast video documentaries on the various goal areas. Citizens responded positively: "The effort aroused the interest of thousands of citizen and strengthened the ties

131. The state must not engage only certain groups and purposely exclude others with a contrary view.

132. See THOMAS, *supra* note 125, at 61-62 (citing A.R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION 81-89 (1983)) (discussing the Port Townsend Terminal case and the time and money government lost by only consulting organized groups and excluding others).

133. Rosenbaum, *supra* note 127, at 372.

134. Bruce W. McClendon & J.A. Lewis, *Goals for Corpus Christi: Citizen Participation in Planning*, 74 NAT'L CIVIC REV. 72, 72-80 (1985).

between citizens, experts and decision makers. The climate for future community involvement was improved. And at the completion of the goals program more than 10,000 ballot responses had been received."<sup>135</sup>

The fatal flaw in the process was that it failed to include municipal administrators who were key actors in implementing the city's goals. But the important thing to glean from this example is that there are lessons states can learn from Corpus Christi and other state bodies that have made an earnest attempt to elicit public participation. In essence, the principles underlying a successful process are representativeness and the presence of structures that promote a balance between deliberation and participation.

### CONCLUSION

*Things Fall Apart*, the classic novel by renowned author Chinua Achebe, is a timeless story about a culture on the verge of change.<sup>136</sup> Through his novel, Achebe brings to our attention the fact that social transition often leads to chaos or instability. In this Article, I have explained how a transitional state can avoid present-day property-related instability when a significant number of people believe that the current property distribution is illegitimate because of past property theft. I first defined legitimacy and past property theft using empirical understandings of the concepts. Second, I established the relationship between a highly unequal property distribution that the general population views as illegitimate and property-related disobedience. Third, I described the three ways that a state can achieve stability when faced with an illegitimate property distribution. The state can use its coercive powers; attempt to influence people's beliefs about the legitimacy of the property distribution through stereotypes and doctrines, for instance; or it can influence people's beliefs through the most effective solution—an LECP.

Fourth, I developed the concept of a legitimacy deficit, which is a rational-choice model that establishes when a state should enact an LECP to avoid property-related noncompliance in the face of pervasive past theft. I argue that as the cost of illegitimacy begins to outweigh the cost of an LECP, the society is in a legitimacy deficit and should enact an LECP. On the contrary, when the cost of an LECP is more than the cost of illegitimacy, then the status quo is stable and failure to address past property theft will not cause property-related disobedience or broader instability. Lastly, I acknowledge that many of the model's costs are subjective so I argue that a state should use a highly participatory process in determining and balancing the costs involved. The model is a valuable contribution to the transitional justice literature because it gives conceptual clarity to the question of how a transitional state can maintain stability in the face of extensive past property theft; it offers citizens, policymakers and academics a framework within which they can identify and debate the various costs and benefits involved;

135. THOMAS, *supra* note 125, at 70 (citing McClendon & Lewis, *supra* note 134, at 74-79).

136. See generally CHINUA ACHEBE, THINGS FALL APART (1958).

and it provides a framework that is versatile enough to apply to a wide array of contexts and time periods.

In conclusion, past property theft can cause a population to believe that the property distribution is illegitimate. In many instances, if nothing is done, property-related rebellion will result. This Article gives insight into how states can prevent things from falling apart.

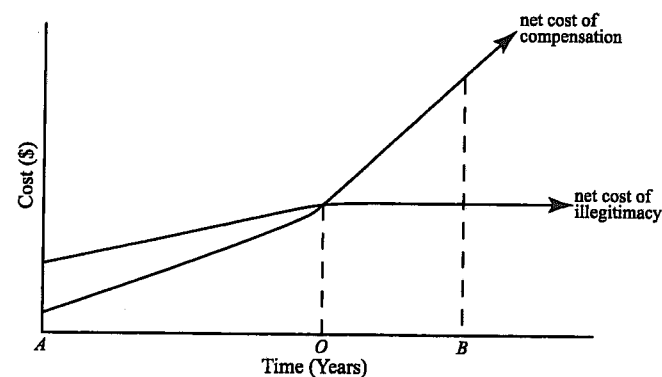
**APPENDIX:  
HYPOTHETICAL ILLUSTRATIONS OF FACTORS AFFECTING THE  
COST CURVES**

Noncompliance can occur for several reasons, but in the models below, the cost of illegitimacy incorporates increases and decreases that are a result of property-related disobedience broadly connected to past property theft. While every country has a unique set of cost curves, there are four core patterns:

Pattern 1: At the point of expropriation the cost of illegitimacy is higher than the cost of compensation. As time progresses, the two lines eventually intersect at the equilibrium point. Beyond the equilibrium point, the lines begin to diverge such that the cost of illegitimacy is less than the cost of compensation.

In this example, the land theft could have caused an immediate violent uprising, which forced the state to ratchet up the use of its coercive power until the situation normalized. The cost of compensation could have started extremely low and then rapidly increased because initially the state distributed state-owned land and then, as time progressed, state land ran out so it had to acquire land from private owners and pay just compensation.

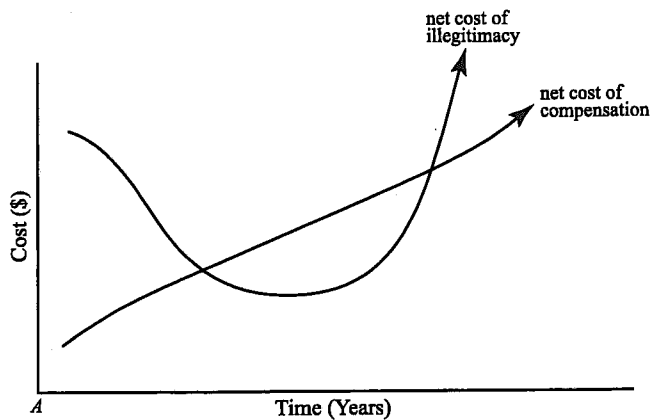
**Legitimacy Deficit:  
Pattern 1**



Pattern 2: The cost of compensation is low at the point of expropriation and gets progressively more costly over time. The cost of illegitimacy is high initially, but gradually decreases until it reaches its nadir; then it suddenly begins to increase again.

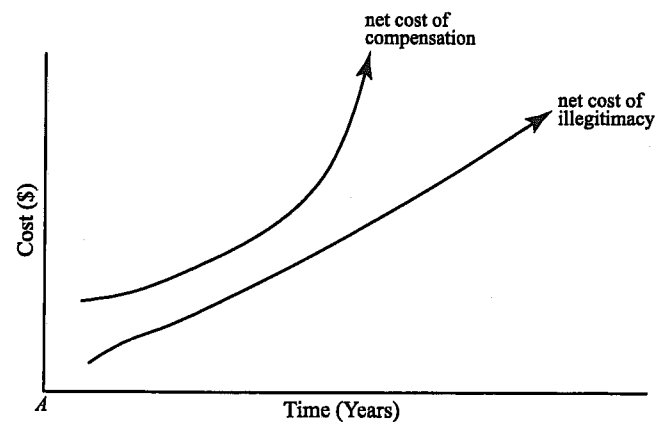
In this example, the cost of compensation could have steadily increased due to economic growth, which led to an increase in the cost of living and thus an increase in the compensation the state had to pay to acquire land for redistribution. The cost of illegitimacy could have been high initially because the state used its coercive power to repress an organized guerilla movement fueled, in part, by the failure of land reform; it could have decreased when the rebellion was suppressed, and it could have increased again when the movement was resurgent.

**Legitimacy Deficit:  
Pattern 2**



Pattern 3: The cost of compensation and the cost of illegitimacy gradually increase (or decrease) as time progresses but the lines never intersect. The legitimacy deficit model suggests that so long as there is a point when the cost of an LECP is less than the cost of illegitimacy, a state should enact an LECP. The model below challenges the framework by illustrating that in some cases the cost of an LECP will never be less than the cost of illegitimacy.

**Legitimacy Deficit:  
Pattern 3**

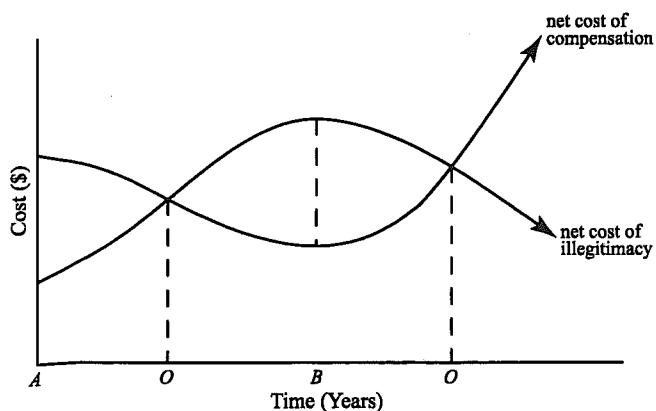


Pattern 4: The net cost of compensation and the net cost of illegitimacy intersect at two distinct points, which means there is only a limited window of time during which a state should implement an LECF.

In this example, perhaps the net cost of compensation was high initially due to the large initial costs inherent in establishing a bureaucracy, but the cost decreased as bureaucrats figured out what they were doing and established efficient systems that propelled the process. The net cost of compensation could have begun to increase again at point *B* due to a cost-of-living increase or because it took those opposed to the LECF time to organize, and at point *B* their opposition made the process more costly. Perhaps the cost of legitimacy started low because the dispossessed bought into myths of inferiority and thus willingly accepted their lot; the cost began to increase due to the eventual initiation of a disobedience campaign where the formerly dispossessed demanded their land back by any means necessary, and the cost decreased again when that movement was suppressed.

The window of opportunity existed before the dispossessors opposed to the LECF mobilized and caused the cost of compensation to shoot back up, but also before the disobedience campaign launched by the dispossessed group was suppressed and the cost of illegitimacy went back down.

Legitimacy Deficit:  
Pattern 4



## THE RACIAL DISPROPORTIONALITY MOVEMENT IN CHILD WELFARE: FALSE FACTS AND DANGEROUS DIRECTIONS

Elizabeth Bartholet\*

*A powerful coalition has made "Racial Disproportionality" the central issue in child welfare today. It notes that black children represent a larger percentage of the foster care population than they do of the general population. It claims this is caused by racial discrimination and calls for reducing the number of black children removed to foster care. But the central question is whether black children are disproportionately victimized by maltreatment. If so, black children should be removed at rates proportionate to their maltreatment rates, which will necessarily be disproportionate to their population percentage. Racial equity for black children means providing them with protection against maltreatment equivalent to what white children get. The evidence indicates that black children are in fact disproportionately victimized by maltreatment. This is to be expected because black families are disproportionately characterized by risk factors associated with maltreatment, including severe poverty, serious substance abuse, and single parenting. These are reasons for concern and reform. But the problems—and consequently the solutions—are entirely different from those identified by the Movement. Society should act to prevent the disproportionate maltreatment of black children, and provide greater support to families at risk of falling into the dysfunction that results in maltreatment. This should result in a reduction in the number of black children in foster care, without putting them at undue risk.*

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